(19,148.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 152.

F. E. KEHRER, PLAINTIFF IN ERROR,

vs.

A. P. STEWART.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

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1 F. E. KEHRER, Plaintiff in Error,
vs.
A. P. STEWART, Defendant in Error. } Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the State of Georgia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between F. E. Kehrer and A. P. Stewart, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or law of the United States and the decision was in favor of such, their validity or wherein was also drawn in question the construction of a clause of the Constitution of the United States and the decision was against the title, law, privilege, or exemption specially set up or claimed under such clause of said Constitution or statute, a manifest error hath happened to the great damage of the said F. E. Kehrer, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the
2 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 24th day of December 1903, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and the custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court of the United States, the 24th day of November in the year of our Lord one thousand nine hundred and three.

[Seal U. S. Circuit Court, N. D. Georgia.]

O. C. FULLER,
Clerk of the Circuit Court of the United States for the Northern District of Georgia.

Allowed by—
T. J. SIMMONS,
Chief Justice of the Supreme Court of Georgia.

Filed in office 25th day of November 1903.
Z. D. HARRISON,
Clerk of the Supreme Court of Georgia.

1—152

3 F. E. KEHRER, Plaintiff in Error,
vs.
A. P. STEWART, Defendant in Error. } Citation.

UNITED STATES OF AMERICA, *ss:*

To A. P. Stewart, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Georgia, wherein F. E. Kehrer is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, — why speedy justice should not be done, to the parties in that behalf.

Witness the Honorable Thomas J. Simmons, chief justice of the supreme court of Georgia, this 24 day of Nov. in the year of our Lord one thousand nine hundred and three.

T. J. SIMMONS,
Chief Justice of the Supreme Court of Georgia.

On this 25th day of November 1903, personally appeared Alex. W. Smith before me, the subscriber, and makes oath that he delivered a true copy of the within citation to A. P. Stewart Esqr.
4 by handing a copy thereof to John C. Hart Esq. and M. M. Jackson Esq. *one of* his attorneys at law of record, and that he at the same time exhibited the original within citation to the said John C. Hart Esqr. and Marion M. Jackson Esq.

ALEX. W. SMITH.

Sworn to and subscribed before me this 25th day of November 1903.

LOGAN BLECKLEY,
Deputy Clerk, S. C. Ga.

Service of the within citation is hereby duly acknowledged and accepted and copy thereof received.
This the 25 day of Nov. 1903.

A. P. STEWART,
By JNO. C. HART,
MARION M. JACKSON,
His Attorneys at Law of Record.

Filed in office this 25th day of Nov'r 1903.

Z. D. HARRISON,
Clerk of the Supreme Court of Georgia.

5 The Supreme Court of the State of Georgia.

F. E. KEHRER
v.
A. P. STEWART. } Petition for Writ of Error.

To the Honorable T. J. Simmons, chief justice of the supreme court of the State of Georgia:

The petition of F. E. Kehrer respectfully shows: That heretofore, to-wit, upon the 22nd day of June 1901 there was tried in the city court of Atlanta, in the county of Fulton of the State of Georgia, a case in which your petitioner was plaintiff and A. P. Stewart was defendant.

The declaration of the plaintiff in said case was a petition for the recovery of damages by reason of a trespass against him in exacting money from him under the name of a tax without authority of law, although purporting to act under and by virtue of the provisions of an act of the General Assembly of the State of Georgia, approved on the 21st day of December 1900, as found in the 19th paragraph of section two of said act, which section sought to impose certain specific taxes on various classes and businesses in said State of Georgia among others, by said 19th paragraph, "upon all agents of packing houses doing business in this State, two hundred dollars in each county where said business is carried on."

6 In his said suit petitioner alleged that the levy and collection of said specific tax from him as in his petition fully set forth was a violation of the rights of petitioner under the 14th amendment of the Constitution of the United States providing that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law," for that it deprived petitioner of the right to work for Nelson Morris & Company at Atlanta, Georgia, and earn his livelihood thereby, without assuming the heavy burden of said tax which is not imposed on other citizens of the United States occupying like positions with lawful business enterprises. That petitioner was a citizen of the United States and that he had no vocation or calling within the State of Georgia save that of an employee of Nelson Morris & Company, who were conducting a lawful business in said State. That petitioner had paid taxes for which he was lawfully liable and which all other clerks or employees of other lawful businesses were required to pay. That to exact of him the payment of said illegal specific tax, as a condition precedent to his accepting, or a condition subsequent to his enjoying employment as a clerk, or employee of said Nelson Morris & Company, or in default thereof to subject his property to seizure, levy and sale, and his person to arrest and imprisonment, and to subject him to criminal prosecution

in the courts of the State of Georgia, would deprive him of
7 his liberty and property without due process of law and deny
him the equal protection of the laws, as guaranteed by the Constitution of the United States. That the attempted classification of subjects for specific taxation in said paragraph 19 of section 2 of said tax act was unreasonable, arbitrary, unnatural, artificial, unlawful, null and void.

Upon the trial of said case in said city court, said defendant demurred generally to your petitioner's said declaration upon the ground that same set forth no cause of action. Said city court by its judgment of the 22nd day of June 1901, overruled said demurrer. Whereupon said defendant by writ of error under the laws of Georgia excepted to said judgment and carried said case to the supreme court of Georgia, same being the highest court of law or equity in said State in which a decision could be had in said case, assigning therein as error the judgment overruling said demurrer by said city court of Atlanta. Under said demurrer the Federal question raised and presented by petitioner's declaration was brought under review by the supreme court of Georgia under defendant's bill of exceptions aforesaid.

Said case came on to be heard in the supreme court of Georgia, and on the third day of April 1902 judgment was rendered therein by said court reversing the judgment of said city court, and announcing the following construction of said tax act, to-wit:

1. The specific tax, "upon all agents of packing houses doing business in this State," which is levied by paragraph 19 of section
2 of the general tax act approved December 21, 1900 (Acts
8 1900, p. 21), is a vocation or occupation tax; and, construing together the various provisions of the act applicable to this tax, it is apparent that the act, in effect, declares that an agent representing a packing house and carrying on its business in any county of this State is pursuing a vocation or occupation, and is himself doing business in this State, and is liable to the tax.

2. The word "agents," as used in this paragraph of the act, means managing or superintending agents, and includes every agent who is the *alter ego* of the principal by whom he is employed.

3. In imposing such tax upon such agents, the act in question is not violative of paragraph 1 of section 2 of article 7 of the constitution of this State, nor of the fourteenth amendment of the Constitution of the United States.

4. The execution issued in the present case sufficiently described the business in which the plaintiff in error, from whom the tax in question was exacted, was engaged.

After the filing of the remitt-ur from the supreme court in said case, but before the judgment of the supreme court was made the judgment of said city court, in conformity with the practice in said court under the laws of Georgia, petitioner filed, under leave of court, an amendment to his said declaration, raising and presenting

additional Federal questions in said case in paragraphs numbered 29 to 36 inclusive, as follows, to-wit:

29. Under the construction of the act of the General As-
9 sembly of Georgia hereinbefore referred to, as announced by the supreme court of Georgia in its decision of this case on writ of error, the special tax of two hundred ($200.00) dollars per annum levied under paragraph nineteen (19) of section two (2) of said act applies to plaintiff alone among the eleven employees of Nelson Morris & Company enumerated in paragraph five of plaintiff's original declaration.

30. The enforced collection of said special tax from plaintiff in the manner set forth in plaintiff's original declaration, under this act, by the terms of which, as construed by the supreme court of Georgia as aforesaid, no like tax can be required of any of the other ten employees of Nelson Morris & Company, all of whom like plaintiff, are only clerks and employees of said Nelson Morris & Company, and without other interest in said business, as alleged in paragraph six of plaintiff's original declaration, deprives plaintiff of his property without due process of law, in violation of paragraph one (1) of article fourteen (14) of the amendments to the Constitution of the United States, commonly known as the fourteenth (14) amendment of said Constitution.

31. The denial to plaintiff of the right to lawfully accept and retain employment with said Nelson Morris & Company in the manner fully set forth in plaintiff's original declaration, without exacting of plaintiff the payment of said specific tax of two hundred ($200.00) dollars as levied in said tax act, under the terms of which as construed by the supreme court of Georgia as aforesaid,
10 such right is not and cannot be denied and such tax is not and cannot be exacted of any of the other employees of Nelson Morris & Company enumerated in paragraph five (5) of plaintiff's original declaration, each of whom, like petitioner, is only a clerk and employee of said Nelson Morris & Company, and without other interest in said business, as alleged in paragraph six (6) of plaintiff's original declaration, is a denial to plaintiff, a citizen of the United States and within its jurisdiction, of the usual protection of the laws, in violation of paragraph one of article fourteen (14) of the amendment- to the Constitution of the United States, commonly known as the fourteenth (14) amendment of said Constitution.

32. To compel plaintiff to go before the ordinary of Fulton county, Georgia, and register his name and place of business, before accepting and retaining employment with said Nelson Morris & Company in the manner and for the tenure, in said original declaration fully set out, under the pain and penalty of a misdemeanor under the terms of said act as construed by the supreme court of Georgia, as aforesaid, when such compulsion and pain and penalties are not and cannot be put upon any of the other employees of said Nelson Morris & Company, each of whom, like plaintiff, is only a clerk and employee of said Nelson Morris & Company, and without other interest in said

business, as in said original declaration set out, is to deprive plaintiff of his liberty in the enjoyment of his faculties and the use of them in a lawful way, of his liberty to live and work when he will, of his liberty to earn his livelihood by a lawful calling, of his liberty to pursue a livelihood or vocation, and of his liberty to enter into a contract which is proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned, and the making and enforcement of said law, as construed by the supreme court of Georgia as aforesaid, against this plaintiff as aforesaid, when same is not and can not be enforced against his co-employees as aforesaid, abridges the privileges and immunities of plaintiff who is a citizen of the United States. All of which is in violation of paragraph one (1), article fourteen (14) of the amendments to the Constitution of the United States, commonly known as the fourteenth (14th) amendment to said constitution.

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33. Plaintiff was at the time this suit was brought and when said tax act was passed, on December 21, 1900, and had been since the 16th day of June 1900, an employee of said Nelson Morris & Company under a contract of employment between plaintiff and said Nelson Morris & Company, whereby plaintiff was to be paid the sum of twenty five ($25.00) dollars per week for his services as chief clerk and manager at the place of business of said Nelson Morris & Company in the city of Atlanta, Fulton county, Georgia, aforesaid. Said tax act of December 21, 1900, as construed by the supreme court of Georgia as aforesaid, converted said contract of employment into a vocation or occupation pursued by plaintiff, and plaintiff is himself declared to be doing business in this State by reason of said contract of employment, and said contract is itself impaired by the compulsory requirements sought to be put upon plaintiff under the terms of said act, whereby plaintiff is required under pains and penalties of a misdemeanor to register his name and place of business and pay a special tax of two hundred ($200.00) dollars before he can continue in the enjoyment of said employment by said Nelson Morris & Company under said contract so made on June 16, 1900, as aforesaid. By reason of which, plaintiff alleges that said act as construed by the supreme court of Georgia as aforesaid, is in violation of paragraph one (1), section ten (10), article one (1), of the Constitution of the United States, providing that no State shall pass any *ex post facto* law, or law impairing the obligation of contracts.

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34. The tax act aforesaid, as construed by the supreme court of Georgia as aforesaid, creates a class for the imposition of said two hundred ($200.00) dollars tax aforesaid, composed of managing and superintending agents who is the *alter ego* of the principal, such principal being a packing house doing business in this State through such managing and superintending agents. Said act, as so construed, does not make managing and superintending agents for any other sort of principal liable for said tax. The business, for

conducting which the tax is imposed, is the pursuit of the vocation or occupation of employment as such managing and superintending agent, and not the business of principal who employs such an agent. Plaintiff alleges that there are many lines of business conducted in Georgia through man-
13 aging and superintending agents, such as the business of wholesale and retail dry-goods, shoes, hats, notions, hardware, groceries, railway supplies, and publishing houses. Such managing and superintending agents are in many cases employed on salaries, as is plaintiff, and are as much engaged in a business of their own as is plaintiff, that is, pursuing the vocation or occupation of accepting and retaining employment for stipulated salaries as superintending and managing agents. The fact that the one may be an agent for a dry-goods house, the other for a show house, the other for a grocery house, does not differentiate the vocation or occupation, as specified in said act, as construed by the supreme court of Georgia as aforesaid, of any one of such agents from another, or from that of plaintiff as agent of a packing house. But said tax act does not attempt to levy this tax on this occupation or business on any such agent except agents for packing houses. Plaintiff alleges that said act for this reason is in violation of the constitution of Georgia, article seven (7), section two (2), paragraph one (1), providing that all taxation shall be uniform upon the same class of subjects, plaintiff further alleges that said act is for the same reason in violation of paragraph one (1), article fourteen (14), of the amendments to the Constitution of the United States, commonly known as the fourteenth amendment to the Constitution of the United States, in this that the privileges and immunities of the plaintiff as a citizen of
14 the United States are abridged, and plaintiff is thereby deprived of his property and of his liberty without due process of law, and the equal protection of the laws is thereby denied to plaintiff.

35. Plaintiff, as chief clerk and manager as aforesaid, is one of the agencies of said Nelson Morris & Company, who employ him in the prosecution of their business. Said Nelson Morris & Company are engaged in the business of curing and packing meats for commerce, and, as part of their business, they ship to other States in the Union fresh meats and the products thereof to be sold to customers calling for same.

As a necessary part of this last mentioned department and as an instrument for carrying on said interstate commerce, said company necessarily has a place in the State of Georgia, to-wit, Atlanta, Fulton county, where said meats and the products thereof are put and temporarily held for sale, and as another part in the conduct of said business, it employs your petitioner as its chief clerk and manager, and, in connection with the other employees and agencies in the original declaration set out, were at the time said act was passed and ever since have been conducting the business of Nelson Morris & Company at its place of business in the city of Atlanta, Georgia, for the

sale and distribution of the products of the packing house of Nelson Morris & Company shipped from said packing house to Atlanta, Georgia.

All these products are manufactured and prepared for mar-
15 ket in the State of Illinois and shipped to the various business places of said Nelson Morris & Company in the United States, including the said house at Atlanta, Georgia.

In most cases, said goods are sold at or before the day of their shipment and when received in Atlanta, delivered in the original packages to the purchasers of said goods and in all cases, title to the goods remains in said Nelson Morris & Company until sold and delivered to their customers. The rest of said goods so shipped to Atlanta, Georgia, are stored in their place of business at Atlanta in the original form and packages as when shipped and delivered and there temporarily remains until in due course of trade the same can be disposed of.

The indebtedness due for goods so sold and delivered is the property of said Nelson Morris & Company and the proceeds thereof are remitted and belong to said Nelson Morris & Company, and said Nelson Morris & Company advances to its employees at Atlanta, Georgia, funds sufficient to defray the expenses of conducting said business.

Petitioner avers that either he or some other person in a similar position to him is a necessary agent and agency in the conducting of said business of Nelson Morris & Company at Atlanta, Georgia.

Petitioner alleges that said business of Nelson Morris & Company so conducted through him and its other employees and agencies at
Atlanta, Georgia, is interstate commerce and the levy of the
16 special tax of $200.00 under said act of 1900 is a direct tax upon interstate commerce and the necessary agencies employed therein, and the provision of said act requiring petitioner to register before the ordinary of said county and to pay said special tax of $200.00 as a condition precedent to acting as chief clerk or manager at the business place of Nelson Morris & Company in Atlanta, Georgia, are regulations of interstate commerce.

Petitioner alleges that said act of the legislature of the State of Georgia, approved December 1, 1900, and known as the general tax act of the years 1901 and 1902, as heretofore referred to, is void in so far as it undertakes in paragraph nineteen of section two to levy a tax "upon all agencies of packing houses doing business in this State, $200.00 in each county where said business is carried on;" and in section four, requiring said chief clerks or managers or agents to go before the ordinary and register their names, their places of business, because said act is an unconstitutional interference with some of the necessary instruments and means of carrying on said commerce between the several States, and in so far as that statute or any other statute of Georgia would try to authorize or command the same, such statutes would be and are contrary to the provisions of the Constitution of the United States and void,

because the States of the Union cannot, and no power but the Congress of the United States can "regulate commerce among the several States," and the commerce above mentioned is com-
17 merce among the several States, as provided under clause three of section eight of article one of the Constitution of the United States.

36. Petitioner alleges that said Nelson Morris & Company in order to dispose of the products shipped from its packing house in the State of Illinois to the city of Atlanta in interstate commerce, it is necessary for said Nelson Morris & Company to have a place of business in the city of Atlanta, where said packing house products can be stored and preserved until sold and delivered, and it is also necessary as part of said interstate commerce that said Nelson Morris & Company should have in its employ and at its place of business at Atlanta, Georgia, some person acting in the capacity of its chief clerk and manager as does your petitioner. And petitioner alleges that neither he nor any other person acting in said capacity could be employed by said Nelson Morris & Company to so act as chief clerk or manager, unless said Nelson Morris & Company would pay for said chief clerk or manager the specific tax of $200.00 per annum required of said agents, either by paying the same practically for your petitioner, or by making the advances in the wages of your employee that would authorize payment of said specific tax.

Petitioner alleges that while said act purports on its face to levy and exact a tax of him as an individual for the privilege of acting as chief clerk and manager at the place of business of said Nelson Morris & Company at Atlanta, Georgia, in truth and in fact and in the practical operation and enforcement of said act, the exac-
18 tion of said tax and the payment of the same is of said Nelson Morris & Company and is a tax on the business of said Nelson Morris & Company which business is that of interstate commerce among the several States and in violation of the Constitution of the United States.

Wherefore, petitioner alleges that said act is an interference with the exclusive power of the Congress of the United States "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," as provided in clause three (3) of section (8) of article one (1) of the Constitution of the United States; and said act of the legislature of Georgia as applied to the occupation of this plaintiff is contrary to said section of the Constitution of the United States, in violation thereof, and therefore unconstitutional and void.

Said defendant, A. P. Stewart, again interposed his general demurrer to petitioner's declaration as amended, on the ground that same set forth no cause of action, and on the trial thereof said city court of Atlanta sustained said demurrer, and on the 28th day of June 1902 entered judgment to that effect and dismissed petitioner's case. Within the time provided by law, petitioner sued out writ of error to the supreme court of Georgia, that being the highest court

of law or equity of the said State in which a decision could be had in said case, assigning therein as error the sustaining of said demurrer in said case by said city court of Atlanta, and the judgment of said court dismissing said case.

19 Said general demurrer raised and presented Federal questions in said case as follows, to wit:

First. That the levy and collection of said specific tax from petitioner deprived him of his leberty and property, under an arbitrary and unlawful classification, without due process of law, and denied him the equal protection of the laws, in violation of the 14th amendment to the Constitution of the United States.

Second. That the requirement upon petitioner to register his name and place of alleged business and pay said tax before accepting and retaining employment with said Nelson Morris & Company, under pain and penalty of a misdemeanor, when such requirements, pains and penalties are not under said law put upon other employees of said Nelson Morris & Company in like situation with petitioner, deprives petitioner of his liberty in the enjoyment of his faculties and the use of them in a lawful way,—of his liberty to live and work when he will,—of his liberty to earn his livelihood by a lawful calling and to enter into a contract which is proper and necessary to effect the purposes mentioned, and thus abridge the privileges and immunities of petitioner, who is a citizen of the United States, in violation of said 14th amendment of the Constitution of the United States.

Third. That said compulsory requirements sough- to be put upon petitioner under said tax act as a condition to his continued enjoyment by Nelson Morris & Company are in violation of paragraph one (1) section ten (10) article one (1) of the Constitution of

20 the United States, providing that no State shall pass any *ex post facto* law, or law impairing the obligation of contracts.

Fourth. That the greater part of the business of Nelson Morris & Company is interstate commerce. That petitioner is employed by them, and the duties imposed upon him are necessary to be performed for and on behalf of Nelson Morris & Company in the conduct of said business, and must be discharged by petitioner or by some person employed by Nelson Morris & Company with like powers and duties. That the levy and collection of said special tax under said act of the legislature of Georgia is a direct tax upon interstate commerce and the necessary agencies employed therein, and the provision of said act requiring petitioner to register before the ordinary of Fulton county, and pay said special tax of $200.00, per annum as a condition precedent to acting as chief clerk or manager at the business place of said Nelson Morris & Company, in Atlanta, Georgia, is a regulation of interstate commerce, for that while said act purports on its face to levy and exact a tax of petitioner as an individual for the privilege of acting as chief clerk and manager at the place of business of said Nelson Morris & Company,

at Atlanta, Georgia, in truth and in fact, and in the practical operation and enforcement of said act, the exaction of said tax and the payment of same is of and by said Nelson Morris & Company and is a tax on, regulation of, and interference with, the business of said Nelson Morris & Company, which business or the greater
21 part thereof is that of interstate commerce in contravention of the exclusive power of the Congress of the United States "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," as provided in clause three (3) of section eight (8) of article one (1) of the Constitution of the United States.

And your petitioner alleged and contended that said act of the legislature of Georgia as enforced against petitioner was repugnant to and in violation of the Constitution and laws of the United States as above set forth.

At the October term 1902, of the supreme court of the State of Georgia, said bill of exceptions and its accompanying record came on to be heard and was argued in said court, and on the 30th day of May, A. D. 1903, the said supreme court rendered its final judgment thereon, affirming the judgment of the court below, namely, the city court of Atlanta aforesaid.

Petitioner further shows that the said judgment of said supreme court was and is a final judgment in the highest court of the State of Georgia in which a decision in said suit can or could be had.

Petitioner further shows that the Federal questions were made in said case as hereinbefore set out, and that said judgments of said supreme court were repugnant to and in conflict with the Constitution and laws of the United States, and that a decision of said Federal questions was necessary to the judgments rendered.

Wherefore, your petitioner presents herewith an exempli-
22 fied transcript of the records of the supreme court of Georgia in said case, and prays that a writ of error to said supreme court be allowed that citation be granted and signed; that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such cases made and provided said bond and writ of error may operate as a supersedeas,—that the errors complained of may be reviewed in the Supreme Court of the United States and the judgments aforesaid of said supreme court of Georgia, be reversed.

F. E. KEHRER, *Petitioner*,
By ALEX W. SMITH,
T. A. HAMMOND,
VICTOR L. SMITH,
His Attorneys.

The writ of error as prayed for in the foregoing petition is hereby allowed, this 24 day of November A. D. 1903, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of two hundred dollars.

Dated at the capitol in the city of Atlanta, Georgia, this 24 day of November A. D. 1903.

T. J. SIMMONS,
Chief Justice Supreme Court of the State of Georgia.

Filed in office November 25th 1903.

Z. D. HARRISON,
Clerk Supreme Court of Ga.

23 F. E. KEHRER, Plaintiff in Error,
vs.
A. P. STEWART, Defendant in Error. } Bond.

Know all men by these presents, that we, F. E. Kehrer, as principal, and The United States Fidelity & Guaranty Co. of Baltimore, as sureties, are held and firmly bound unto A. P. Stewart in the full and just sum of two hundred dollars, to be paid to the said A. P. Stewart, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of November in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a session of the supreme court of Georgia in a suit depending in said court, between said F. E. Kehrer, plaintiff in error, and said A. P. Stewart, defendant in error, a judgment was rendered against the said F. E. Kehrer, and the said F. E. Kehrer having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said A. P. Stewart citing and admonishing him to be and appear before the Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof.

24 Now, the condition of the above obligation is such, that is the said F. E. Kehrer shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his said plea good, then the above obligation to be void; else to remain in full force and virtue.

F. E. KEHRER. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By FRANK H. REYNOLDS,
Att'y in Fact. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO.,
By T. A. HAMMOND. [SEAL.]

Sealed and delivered in presence of
F. L. NEUFVILLE.
ALBERT BOYLSTON,
Notary Public, Fulton County, Ga.

Approved by
T. J. SIMMONS, *Chief Justice Supreme Court of Ga.*

Filed in office Nov. 25th, 1903.

Z. D. HARRISON,
Cl'k Supreme Court of Ga.

25 The Supreme Court of the State of Georgia.

F. E. KEHRER, Plaintiff in Error,
v.
A. P. STEWART, Defendant in Error. } Assignment of Errors.

And now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decisions, and final judgment of the supreme court of the State of Georgia, in the above entitled matter there is manifest error in this, to-wit:

First. The court erred in holding that the specific tax upon all agents of packing houses doing business in this State, levied and collected of plaintiff in error under the provisions of paragraph 19 of section 2 of the general tax act of Georgia, approved December 21, 1900, and the provisions of section 4 of said act, requiring plaintiff in error to register his name and place of business, (Acts of Georgia Legislature 1900, p. 21), are not violative of paragraph 1 of article 14 of the amendments of the Constitution of the United States, known as the fourteenth amendment of said Constitution, for that the State of Georgia by and through said provisions of said act seeks

(*a.*) To deprive plaintiff in error of his liberty and property under an arbitrary and unlawful classification, without due process of law.

26 (*b.*) To abridge the privileges and immunities of plaintiff in error, as a citizen of the United States.

(*c.*) To deny to plaintiff in error the equal protection of the laws.

Second. The court erred in holding that the provisions of said act, paragraph 19, section 2 and section 4, are not violated of paragraph 1, section 10, article 1 of the Constitution of the United States, providing that no State shall pass any law impairing the obligations of contracts, for that the State of Georgia by and through the provisions of said paragraph and section assumes and seeks to make unlawful an existing valid contract of employment between plaintiff in error and his employers, and to subject plaintiff in error to the pains and penalties of a misdemeanor for complying with said contract without first registering his name and place of business and paying said specific tax as conditions precedent to enjoying the fruits of said lawful contract.

Third. The court erred in holding that by the provisions of said paragraph and section of said act which require plaintiff in error to register and become liable to said specific tax by reason of his being agent for Nelson Morris & Company, the greater part of whose business is interstate commerce in the conduct of which the services of plaintiff in error are necessary, there is no unlawful tax upon or

interference with or regulation of interstate commerce in vio-
27 lation of clause 3, section 8, article 1 of the Constitution of the United States, for that

(*a.*) A tax on the privilege of selling goods is in effect a tax on the goods themselves.

(*b.*) One who, in this State, as the agent of a princip*le* residing in another State, takes orders on such principal for the purchase of goods held in such other State, and who, when the goods are shipped by his principal to him, receives them in this State, and delivers them in the original packages to the customers from whom he obtained the orders, and upon delivery receives from them the price of the goods, is engaged in interstate commerce.

(*c.*) Interstate commerce can not be taxed, regulated or interfered with in any manner or to any extend by the laws of any State.

(*d.*) A law of a State which taxes, regulates, or interferes with a business as a whole, while said business is partly interstate and partly domestic, must be so framed and enforced as to operate alone upon that part of said business which is domestic, in default of which the entire law is void as being repugnant to the Constitution of the United States providing that Congress has exclusive power to regulate commerce among the several States.

(*e.*) Said paragraph and section of said act of the legislature of Georgia, by their terms and necessary operation, impose a tax and a regulation upon the entire business of Nelson Morris & Company, including that part of the business of Nelson Morris & Company
which is interstate commerce. This is alleged to be the
28 greater part of said business and the demurrer admits the truth of the allegation.

Fourth. The court erred in holding that one who is subject to a specific occupation tax by reason of his conducting, for another, a domestic business within this State, is not rendered exempt from such tax because he also conducts for the same principal other business which is not subject to State taxation, for that such a tax upon such an occupation cannot be segregated, and must rest upon the sales of goods made both in domestic and interstate commerce, and hence amounts to a tax upon and regulation of the latter in violation of said provisions of the Constitution of the United States.

Fifth. The court erred in affirming the judgment of the said city court of Atlanta sustaining said demurrer, and in not reversing said judgment and sending said case back for further proceedings in accordance therewith.

Dated this 24th day of November 1903.

ALEX W. SMITH,
T. A. HAMMOND,
VICTOR L. SMITH,
Attorneys for F. E. Kehrer.

Filed in office November 25th, 1903.

Z. D. HARRISON,
Clerk Supreme Court of Ga.

29 Be it remembered that at the May term 1901, of the city court of Atlanta, Fulton county, Georgia, his honor H. M. Reid judge of the city court of Atlanta, presiding, there came on to be heard in the case of F. E. Kehrer *vs.* A. P. Stewart, the same being an action of complaint, a general demurrer to the original petition, which general demurrer the court overruled, to which ruling said defendant excepts, and now assigns the same as error.

Defendant specifies as material to a clear understanding of the error complained of, the following:

The original petition.

The demurrer.

And now comes said A. P. Stewart, within thirty (30) days from the rendition of said judgment over-ruling the demurrer, and presents this bill of exceptions, and prays that the same may be signed and certified that the error complained of may be reviewed and corrected.

BLACK & JACKSON,
Attorneys for A. P. Stewart.

I do certify that the foregoing bill of exceptions is true, and specifies all of the record material to a clear understanding of the error complained of, and the clerk of the city court of Atlanta, Fulton county, Georgia, is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to
30 be transmitted to the October term of the supreme court, that the error alleged to have been committed may be considered and corrected.

H. M. REID, *Judge.*

July 5, 1901.

Due and legal service of the within bill of exceptions acknowledged; copy and all other and further notice and service waived.

This 5th day of July, 1901.

SMITH, HAMMOND & SMITH,
Att'ys for Defendant in Error.

STATE OF GEORGIA, }
County of Fulton. }

ATLANTA, GA., *August* 21, 1901.

I hereby certify, that the foregoing bill of exceptions, hereunto attached, is the true, original bill of exceptions, in the case stated, to-wit: A. P. Stewart, plaintiff in error, *vs.* F. E. Kehrer, defendant in error, and that a copy thereof has been made and filed in this office.

Witness, my signature and the seal of said court affixed, the day and year above written.

ARNOLD BROYLES,
[SEAL.] *Clerk City Court of Atlanta.*

Endorsed: No. 55 Atlanta circuit, October term, 1901. Supreme court of Georgia. A. P. Stewart *v.* F. E. Kehrer. Bill of exceptions. Filed in office July 6, 1901. Arnold Broyles, clerk. Filed in office Aug. 22, 1901, Logan Bleckley, D. C. S. C. Ga.

Petition.

GEORGIA,
Fulton County.

To the city court of Atlanta, said county:

The petition of F. E. Kehrer against Andrew P. Stewart of said county shows to the court as follows:

1. Nelson Morris & Co., is a copartnership composed of Nelson Morris, Edward Morris, and Ira N. Morris, citizens of the State of Illinois.

2. A packing house is a place where the business of slaughtering animals and dressing and preparing the products of their carcasses for food and other commercial purposes is carried on.

3. Said Nelson Morris & Co., do not anywhere within the State of Georgia slaughter, dress, cure, pack, or manufacture products of any animals for food or commercial use.

4. Said Nelson Morris & Co., have in the city of Atlanta,
32 said county, a place of business where at wholesale they sell fresh, cured and salt meats and the products that have been manufactured from the carcasses of slaughtered animals, and in said State and county conduct no other kind of business.

5. At their said place of business in Atlanta, said county, there are eleven employees, that is, your petitioner, the book-keeper, the assistant book-keeper, the stenographer, (who also acts as billing clerk) the shipping clerk, two salesmen, the man in charge of the cooler where the meats are preserved until sold, two drivers, and a laborer who boxes, wraps and crates goods for delivery as they are sold.

6. Each of said employees, including your petitioner, is only a clerk and employee of said Nelson Morris & Co., at Atlanta, and neither your petitioner nor any of said clerks has any interest in said business other than that of paid employees.

7. Your petitioner shows that on or about the 16th of June 1900 he accepted employment with said Nelson Morris & Co., at Atlanta, Ga., his employment being fixed for no definite term, the agreement being that he was to be paid at the rate of $25.00 per week for the time actually employed, and to be subject to be removed or discharged without notice.

8. Since June 16, 1900, your petitioner has been employed by said firm at Atlanta, Ga., as their clerk and manager, and hopes to continue so employed during the year 1901.

9. Petitioner shows that at the last session of the General
33 Assembly of Georgia, an act was passed, which was approved on the 21st day of December 1900, to levy and collect a tax

for the support of the State government and for other purposes expressed in its caption, for each of the fiscal years 1901, and 1902. Said tax act assessed and levied an ad valorem tax of a certain per-centum upon the taxable property in said State, for each of said years, and also provided for certain specific taxes for each of said years.

10. Among the specific taxes mentioned in said act, is one covered by the 19th paragraph of section 2, in the following words:

"Upon all agents of packing houses doing business in this State two hundred dollars in each county where said business is carried on."

11. Said act in its 4th section enacted that said specific tax, with others, should "be paid in full for the fiscal year for which they are levied, to the tax collectors of the counties where such vocations are carried on, at the time of commencing to do the business specified" in said paragraph 19 and other specified paragraphs.

12. In the same section 4 of said act, it was further provided that "Before any person taxed by paragraph 19, (and other enumerated paragraphs) of section 2 of this act shall be authorized to carry on said business, they shall go before the ordinary of the county in which they propose to do business, and register their names, place of business, and at the same time pay their taxes to the tax collector; and it shall be the duty of said ordinary to immediately notify the comptroller-general and the tax collector. Any person fail-
34 ing to register with the ordinary or having registered, failing to pay the tax as herein required shall be liable to indictment for misdemeanor, and on conviction, shall be fined not less than double the tax, or be imprisoned as prescribed by section 1039 of vol. 3. of the Code of 1895, or both, in the discretion of the court. One half of said fine shall be applied to the payment of the tax, and the other to the fund of fines and forfeitures for the use of officers of court."

13. Petitioner shows that said defendant, Andrew P. Stewart, is the tax collector of the *court* of Fulton, and as such tax collector on the 26th day of February, 1901, in said county, issued a *fi. fa.* against petitioner, directed to the sheriffs and constables of this State, commanding them that of the chattels, lands, and tenements of your petitioner they cause to be made, by levy and sale, the sum of $200 with interest and cost of *fi. fa.*, "the amount of specific tax due the State of Georgia for the year 1901, for carrying on the business in Fulton county, of agents of Nelson Morris & Co., a packing house doing business in this State." A copy of the *fi. fa.* so issued is hereto attached and made a part hereof, marked Exhibit "A."

14. Petitioner shows that the said *fi. fa.* having been so issued, said Stewart, tax collector and *ex officio* sheriff of said county, assuming to act under authority of law, did on the 28th day of February 1901, call upon and demand of your petitioner that he pay
35 to him the amount of said specific tax, to wit: $200.00, besides $2.65 interest and $4.50 cost of *fi. fa.*

15. When called upon, your petitioner refused to pay said alleged specific tax, protesting that he was not liable therefor, and did not come within its terms. Whereupon said Stewart as tax collector and *ex-officio* sheriff as aforesaid threatened to levy upon and to seize sufficient of your petitioner's property to make the amounts claimed under said *fi. fa.* and at the same time notified your petitioner that unless he would pay said alleged tax and register with the ordinary of said county, as provided for in said sec. 4, of said tax act, he would cause an accusation to be sworn out, charging your petitioner with a misdemeanor, and would arrest and imprison your petitioner and prosecute him.

16. While your petitioner did then and there deny that he was subject to the provisions of said act, asserting his nonliability to pay said tax, and protesting that he did not owe the same, yet in order to prevent the threatened levy and the immediate seizure of his property and person, he did on the 28th day of February, 1901, under said urgent and immediate necessity, and to prevent said seizure, pay to said Stewart, tax collector and *ex-officio* sheriff, the sum of $207.15, the same being for the alleged specific tax, $200.00 interest $2.65, and cost of *fi. fa.* $4.50, all as demanded by said Stewart; and at the same time took from said Stewart as the levying
officer a receipt a copy of which is hereto attached, made a
36 part hereof and marked Exhibit "B."

17. Petitioner further shows that in order to prevent arrest and imprisonment in the common jail of said county, and to prevent being prosecuted as for a misdemeanor, he did, under duress from said Stewart, and under protest, register with the ordinary of said county as required by said act, taking a certificate from said ordinary, a copy of which is hereto attached, made a part hereof, and marked Exhibit "C."

18. Petitioner avers that in the issuance of said *fi. fa.* and the threatened levy thereof, and the threatened seizure of petitioner's property and person, said tax collector, while claiming to act as an officer of Georgia, in pursuance of its laws, did act and is acting without authority of law, and in defiance of law, which protects the legal rights of petitioner, and in said conduct does not represent the said State of Georgia in discharging the duties imposed upon him by the Constitution of the United States or the constitution of Georgia or the laws made pursuant thereto.

19. Of all the foregoing facts, said Stewart had notice before the issuance and threatened levy of said *fi. fa.*, but wholly regardless thereof, did issue said *fi. fa.* and as *ex-officio* sheriff did enforce the collection of said specific tax under the same, as above stated, and has thus forced your petitioner, in order to protect his person and property, to pay said sum so demanded of him.

20. The issuance of said *fi. fa.* and all subsequent proceedings thereunder, were and are without authority of law, and were
37 and are null and void; the said claim of $200, with interest and cost, against your petitioner, was no lawful claim, peti-

tioner owed no such tax, and there is no law requiring petitioner to pay said $200, with interest and cost, or any part thereof, and said tax was exacted of your petitioner illegally and without authority of law.

21. The constitution of the State of Georgia, under section 5883 of the Code of 1895, provides that "All taxes shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." The provisions of the 19th paragraph of sec. 2, of said tax act are obnoxious to this section of the constitution, for that said specific tax is not uniform upon the same class of subjects.

22. By the fourteenth amendment to the Constitution of the United States, as set out in sec. 6030 of the Code of Georgia, of 1895, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within the jurisdiction the equal protection of the laws." The levy and collection of said specific tax from petitioner, as hereinbefore alleged, is a violation of the rights of petitioner under said 14th amendment of the Constitution of the United States, for that it deprives petitioner of the right to work for said Nelson Morris & Co. at Atlanta, Ga., and earn his livelihood thereby, without assuming the heavy burden of
38 said tax, which is not imposed on other citizens of the United States occupying like positions with lawful business enterprises.

23. Your petitioner shows that he is a citizen of the United States and that he has no vocation or calling within the State of Georgia, nor does he on his own account nor as agent conduct or carry on any packing house business or any other business, except that he is a mere paid employee of Nelson Morris & Co., who are conducting and carrying on a lawful business in the city of Atlanta, in the manner as above set forth, and petitioner avers that under the constitution of the State of Georgia, and of the United States, he has a perfect right to be so employed, without paying any special tax or fee therefor.

24. Your petitioner shows that for the year 1901, he is subject to and liable to pay only such specific taxes as any and all other clerks or employees of any other lawful business in which they may be employed in the State of Georgia, are required to pay and an ad valorem tax on all property subject to be taxed within the territorial limits of the authority levying the tax, under general laws; and at the proper time and place for paying such specific tax as under the law he is liable to pay, he will pay to the State and county whatever taxes he may legally owe. But petitioner avers that he does not now owe, nor can he be made at any time to owe any tax for the privilege of being a clerk or employee in the said business of Nelson Morris & Co., at Atlanta, Ga.

39 25. Petitioner avers that to exact of him the payment of said illegal specific tax, as a condition precedent to his accepting or a condition subsequent to his enjoying employment as a clerk or employee of said Nelson Morris & Co., as above set forth, or in default thereof to subject his property to seizure, levy and sale, and his person to arrest and imprisonment and to subject him to criminal prosecution in the courts of this State, would be to deprive him of the rights granted by the Constitution of the United States, and deprive him of his liberty and property without due process of law, and deny to him the equal protection of the law.

26. Petitioner avers that the attempted classification of subjects for specific taxation in said paragraph 19 of sec. 2, in said tax act is unreasonable, arbitrary, unnatural and artificial, and so far as it is attempted to apply the same to him, is unlawful, null and void.

27. Petitioner alleges that said Stewart, having collected the sums heretofore stated from him, now holds the same without authority of law, and fails and refuses to refund said sum or any part thereof to your petitioner, though often requested so to do.

28. The premises considered, petitioner alleges that said Stewart is guilty of a trespass against him in exacting money from him under the name of a tax, when there is no law to warrant the collection of the same, and such collection is not a collection of any tax, but the enforced demand and collection of money without authority
40 of law, and in forcing your petitioner to pay to him the said sum of $207.15, and in the holding of the same, said Stewart has injured and damaged your petitioner, and on the 28th day of February, 1901, became liable to pay your petitioner the damages done to him, to-wit; the sum of one thousand dollars, or other such large sum.

Wherefore your petitioner prays that process issue, requiring the said defendant Andrew P. Stewart to be and appear at the next term of said court, to answer your petitioner's complaint.

SMITH, HAMMOND & SMITH,
Petitioner's Att'ys.

EXHIBIT "A."

STATE OF GEORGIA, }
Fulton County. }

To all and singular the sheriffs and constables of this State, Greeting:

You are hereby required, that of the goods and chattels, lands and tenements of F. E. Kehrer you cause to be made by levy and sale sufficient thereof to make the sum of two hundred dollars, the amount of specific tax due the State of Georgia, for the year 1901, for carrying on the business in Fulton county, of agents of Nelson Morris & Co., a packing house doing business in this State, also the further

sum of fifty cents for this *fi. fa.*, and a sufficient amount to cover interest on said principal tax, at the rate of seven per cent. per
41 annum, from January 2, 1901, until settled, together with all costs that may hereafter accrue, and have you the said sum of money to be paid to me upon collection thereof, to be rendered to the State the principal, interests and costs aforesaid, as required by law, and have you then and there this writ.

Given under my hand and official signature this 26th day of Feb'y 1901.

[L. S.] A. P. STEWART,
T. C., Fulton Co.

EXHIBIT "B."

GEORGIA, }
Fulton County. }

Whereas, A. P. Stewart, tax collector of Fulton county, Georgia, has issued an execution dated 26th day of February 1901, against F. E. Kehrer to make the sum of two hundred (200) dollars with interest and costs for specific tax due the State of Georgia, for the year 1901, for carrying on the business in said county as agents of Nelson, Morris & Co., a packing house doing business in this State, and whereas, said execution has been duly placed in the hands of the undersigned, levying officer for enforcement, and same has been presented to the said defendant, and payment demanded, and refused, and

Whereas, the undersigned officer was about to immediately levy said execution, upon and seize the property of the said defendant and the said defendant under an urgent, and immediate necessity, and to prevent the said seizure, and protesting that he was not and is not liable to pay the said tax, did pay the same under duress as aforesaid.

42 Now I do hereby acknowledge receipt from F. E. Kehrer of the sum of two hundred (200) dollars principal, $2.65 interest and $4.50 costs in full of the said execution, said amount to be entered in my return on the said execution, and accounted for to the said tax collector, the same being paid under the circumstances above recited. This 28, day of Feb'y, 1901.

A. P. STEWART,
T. C. and ex-Off. Sheriff.

EXHIBIT "C."

GEORGIA, }
Fulton County. }

I, John R. Wilkinson, ordinary in and for said county do hereby certify that F. E. Kehrer of said county who has this day registered before me under provisions of section 4 of the general tax act of 1901–1902, did so under protest, contending that he was and is not

subject to the terms and provisions of said act, and registers only because the "tax authorities insist that he is subject, and threaten to prosecute him for a misdemeanor if he fails to register.

Feb'y 28, 1901.

JOHN R. WILKINSON, *Ordinary.*

Filed in office April 6th, 1901.

R. S. McFARLIN, *D. Cl'k.*

Due and legal service of the within petition acknowledged and copy received. Process, copy process and all further service waived. This April 6, 1901.

EUGENE R. BLACK,
Att'y for Def't.

43 *Demurrer.*

GEORGIA, }
Fulton County. }

City Court of Atlanta, May Term, 1901.

F. E. KEHRER }
vs. } No. 12408.
A. P. STEWART. }

Now comes A. P. Stewart, defendant in the above stated case, through his attorneys Black and Jackson, and demurs to the petition of said F. E. Kehrer, for the following reason:

Said petition sets forth no cause of action:

Wherefore said defendant, A. P. Stewart, prays that said petition be dismissed, and that he be given judgment against the plaintiff, F. E. Kehrer for cost in the above stated case.

BLACK AND JACKSON,
Def't's Att'ys.

Filed in office May 6, 1901.

R. S. McFARLIN, *D. Clerk.*

The foregoing demurrer coming on for hearing, after argument of counsel, it is considered, ordered and adjudged that the same be and it is hereby overruled.

In open court, June 22, 1901.

H. M. REID, *Judge.*

44 Superior Court of Fulton County, City Court of Atlanta, Criminal Court of Atlanta.—Arnold Broyles, Clerk.

I hereby certify, that the foregoing pages, hereunto attached, contain a true transcript of such parts of the record as are specified in the bill of exceptions and required by order of the presiding judge

of city court of Atlanta to be sent to the supreme court in the case of A. P. Stewart, plaintiff in error *v.* F. E. Kehrer, defendant in error.

I further certify, that the —— term of said court at which said case was tried, adjourned —— 190–. All og which appears from the records and minutes of said court.

I did not send up this record in 10 days because on account of press of business I was unable to do so.

Witness my signature and the seal of said court, affixed this the 21 day of August 1901.

[SEAL.] ARNOLD BROYLES,
Clerk of Superior Court of Fulton County and ex-Officio Clerk City Court of Atlanta and Criminal Court of Atlanta.

Endorsed: No. 55 Atlanta circuit, October term, 1901. Supreme court of Georgia A. P. Stewart *v.* F. E. Kehrer. Transcript of record. Filed in office Aug. 22 1901, Logan Bleckley, D. C. S. C. Ga.

45 55 Atlanta.

STEWART
v.
KEHRER.

1. The specific tax, "upon all agents of packing houses doing business in this State," which is levied by paragraph 19 of section 2 of the general tax act approved December 21, 1900 (Acts 1900, p. 21), is a vocation or occupation tax; and, construing together the various provisions of the act applicable to this tax, it is apparent that the act, in effect, declares that an agent representing a packing house and carrying on its business in any county of this State is pursuing a vocation or occupation, and is himself doing business in this State, and is liable to the tax.
2. The word "agents," as used in this paragraph of the act, means managing or superintending agents, and includes every agent who is the *alter ego* of the principal by whom he is employed.
3. In imposing such tax upon such agents, the act in question is not violative of paragraph 1 of section 2 of article 7 of the constitution of this State, nor of the fourteenth amendment of the Constitution of the United States.
4. The execution issued in the present case sufficiently described the business in which the plaintiff in error, from whom the tax in question was exacted, was engaged.

Argued February 19, decided April 3, 1902; rehearing denied April 21, 1902.

46 FISH, *J.:*

On the 26th of February, 1901, A. P. Stewart, as tax-collector of Fulton county, issued an execution against F. E. Kehrer, for

the sum of two hundred dollars, as "the amount of the specific tax due the State of Georgia, for the year 1901, for carrying on the business, in Fulton county, of agents of Nelson Morris & Co., a packing-house doing business in this State," and for a sufficient amount to cover interest upon said sum from January 2, 1901, and the further sum of the costs involved. Kehrer, under protest, paid the aggregate amount called for by the execution, and subsequently brought the present action against Stewart, to recover the sum thus paid. The defendant demurred to the plaintiff's petition, upon the ground that it set forth no cause of action. The court overruled this demurrer, and the defendant excepted. The question to be determined is, whether the plaintiff, taking the allegations of his petition to be true, was liable for the tax exacted of him by the tax-collector. The petition alleged that the tax in question was exacted of the plaintiff under paragraph 19 of section 2 of the general tax act, approved December 21, 1900, which provided for the levy and collection of taxes for the support of the State government, and for other purposes expressed in its title, for each of the fiscal years 1901 and 1902; that said act provided for certain specific taxes for each of these fiscal years, among which specific taxes is the one provided for in the above-mentioned paragraph of the act, in the following words: "Upon
47 all agents of packing-houses doing business in this State, two hundred dollars in each county where said business is carried on." It further alleged that "Nelson Morris & Co. is a co-partnership composed of" named persons, "citizens of the State of Illinois;" that "a packing house is a place where the business of slaughtering animals and dressing and preparing the products of their carcasses for food and other commercial purposes is carried on;" that "Nelson Morris & Co. do not anywhere within the State of Georgia slaughter, dress, cure, pack, or manufacture products of any animals for food or commercial use;" but "they have in the city of Atlanta, said county, a place of business where at wholesale they sell fresh, cured, and salt meats and the products that have been manufactured from the carcasses of slaughtered animals, and in said State and county conduct no other kind of business;" that at this place of business "there are eleven employees," including the plaintiff, each of whom "is only a clerk and employee of said Nelson Morris & Co. at Atlanta," and neither of whom "has any interest in said business other than that of paid employees;" that, "on or about the 16th of June, 1900," the plaintiff "accepted employment with said Nelson Morris & Co., at Atlanta, Ga., his employment being fixed for no definite term, the agreement being that he was to be paid at the rate of $25.00 per week for the time actually employed, and to be subject to be removed or discharged without notice;" and since that date plaintiff "has been employed by said firm at Atlanta, Ga., as their clerk
48 and manager, and hopes to continue so employed during the year 1901." It was further alleged that "the issuance of said *fi. fa.* and all subsequent proceedings thereunder were

and are without authority of law, and were and are null and void; that the said claim of $200, with interest and cost, against [plaintiff], was no lawful claim, petitioner owed no such tax, and there is no law requiring petitioner to pay said $200, with interest and cost, or any part thereof, and said tax was exacted of [him] illegally and without authority of law;" that the provisions of the 19th section of the general tax act of December 21, 1901, are in conflict with the provision of the constitution of this State which requires that "All taxes shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws," and are also in conflict with the fourteenth amendment of the Constitution of the United States.

1. The decision of this case turns upon the meaning of the words, "upon all agents of packing houses doing business in this State, two hundred dollars in each county where said business is carried on," as used in the general tax act for the years 1901 and 1902. In the first place, it is perfectly clear that the tax is not laid upon packing houses, but is laid upon "agents of packing houses." It is contended by the defendant in error that the words, "doing business in this State," and the words, "where said business is carried
49 on," refer to the business of the packing house, and not to the business of the agent of the packing house, and, therefore, the tax is laid on the business of the packing house. It is further contended that the petition shows that Nelson Morris & Co., the firm for which the defendant in error was agent, were not doing a packing house business in this State. An elaborate and, in some respects, a forcible argument is made to show that an agent conducting business for another has no business of his own which he can be said to be carrying on, and that therefore the phrase, "doing business in this State," and the expression, "said business," must necessarily refer to the business of the principal. It does seem somewhat anomalous to speak of the business of one who, as agent, is really not conducting a business of his own, but the business of some one else; but it was within the power of the legislature to declare that one doing this very thing was himself carrying on business, and we think that is exactly what the General Assembly has done in this instance. We think it is clearly evident, from the general tax act of 1900, that the tax under consideration is a tax upon occupation or vocation, one to be paid for the right or privilege of engaging in such occupation or vocation; and that the expressions, "doing business," and "business is carried on," refer to the exercise of the vocation of a packing house agent. If this is not clear from the wording of the paragraph which we are considering, it becomes clear when such paragraph is considered in connection with subsequent provisions of the act, in reference to the specific tax in question.
50 Section 4 of the act provides that the taxes levied in numerous paragraphs of section 2, including paragraph 19, "shall be paid in full, for the fiscal years for which they are levied, to the

tax-collectors of the counties where such *vocations* are carried on, *at the time of commencing to do business specified in said paragraphs;* and that, "before any person taxed" by these paragraphs "shall be authorized to carry on said business, they shall go before the ordinary of the county in which they propose to do business and pay their taxes to the tax-collector." Owing to a hiatus in this section of the act of 1900 as compared with the same section in the act of 1898, the purpose for which the "person taxed" is required to go before the ordinary does not appear in the latter act. The object of this requirement is shown by the act of 1898 to be, to "register their names [and] places of business." As this section is otherwise the same in both acts, we think the purpose of the General Assembly was the same in both instances.

From section 4 of the act it is apparent that the tax is a vocation tax, and that it is to be paid to the tax-collector of the county where such vocation is carried on. As the tax is laid upon "agents of packing houses," it is evident that, relatively to this particular tax, the vocations referred to are the vocations of those who are required to pay the tax, that is, "agents of packing houses," and that when such an agent does business for his principal in any county
51 of this State, he is carrying on in that county, the vocation of a packing-house agent. The agent of the packing-house shall pay the tax "at the time of commencing to do business." It seems manifest that the word, "business," here refers to the business of the agent, and not that of the principal, for it is the agent and not the principal who shall pay the tax "at the time of commencing to do business." Again, "before *any person taxed*" by this paragraph "shall be authorized *to carry on said business, they* shall go before the ordinary of the county in which *they propose to do business* and pay *their* taxes to the tax-collector." Clearly the word "business" here does not refer to the business of the packing house, for it is not the packing house, but the "person taxed," that is the agent, who, upon complying with the requirements of the statute, "shall be authorized to carry on said business," and who shall "go before the ordinary of the county in which *they propose to do business* and pay *their taxes* to the tax-collector." When the provisions of the act applicable to the question under consideration are construed together, we think it is quite evident that the word "business," as used in the paragraph which levies a tax "upon all agents of packing houses," refers to and means the business of the packing-house agent; and that one exercising the vocation of such an agent is "doing business" within the meaning of the act. Counsel for the defendant in error contend that, from the petition, it appears that Nelson Morris & Co. do not carry on a packing-house business in Georgia. The petition does not allege that this firm is not a packing house, and therefore it is to be presumed that it is properly described as such in
52 the execution. The allegation that the firm does not carry on a packing-house business at Atlanta or elsewhere in this State, is deprived of its force by the definition which the petition

gives of a packing-house and the allegation in reference to the kind of business which Nelson Morris & Co. carry on in the city of Atlanta. It is a matter of common knowledge that a part of the business of a packing house consists in the sale of the products which it prepares for this purpose. The petition states that these products are prepared for "commercial purposes;" and the consummation of such purposes by the sale of the prepared products is as much a part of the business of the packing house as is the preparation of the products. It would be sticking in the bark to hold that a firm is doing a packing-house business when it is engaged in "slaughtering animals and dressing and preparing the products of their carcasses for food and other commercial purposes," but is not carrying on a packing-house business when it is selling "fresh, cured and salt meats" and other "products" that it has "manufactured from the carcasses of slaughtered animals" for this very purpose.

2. Another contention of the learned counsel for the defendant in error is, that if Kehrer is an agent of Nelson Morris & Co., then every other employee of that firm, connected in any way with the business which it conducts in the city of Atlanta, is also its agent and liable to this specific tax, and therefore the tax is unconstitutional, "because so arbitrary, unreasonable, and unjust as to
53 amount to prohibition." While it is true that every employee of a packing house, from the highest to the lowest, may be, in a restricted sense within the scope of his authority, its agent, one in speaking of the vocation or business of a mere bookkeeper, clerk, stenographer, or drayman, who happened to be in its employment, would hardly call him "the agent of a packing house." But it would be perfectly natural to so designate the general manager, through whom a packing house conducts its entire business in a given locality. That the word "agent" should be given the interpretation placed upon it in the second head note seems to us perfectly apparent, for to hold otherwise would be to attribute to the General Assembly the utterly unreasonable purpose of imposing a specific tax of two hundred dollars upon every employee of a packing house doing business in Georgia, without regard to the extent of his authority or the amount of his compensation. We think it, therefore, manifest that the purpose was to tax only one agent in each county, representing or conducting the business of a packing house, and as only one, the managing or head agent, in charge of the business, was the one intended.

3. In imposing such tax upon such agents, the act in question is not violative of paragraph 1 of section 2 of article 7 of the constitution of this State. That paragraph of the constitution provides: "All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied
54 and collected under general laws." The General Assembly of this State, in the imposition of specific taxes upon occupations, has the constitutional power to classify subjects for taxation,

taxing some and omitting to tax others; and the principle of uniformity required by this paragraph of the constitution is not violated so long as a given tax is made uniform upon all individuals belonging to the particular class on which it is imposed. Singer Manufacturing Co. *v.* Wright, 97 Ga. 114, and cases therein cited. The legislature has the right to classify, and it has classified. It has created a new class of occupations to be taxed, viz., "agents of packing houses," and has imposed an occupation tax upon all of that class. The tax is not violative of the fourteenth amendment of the Constitution of the United States. It does not deny to any person "the equal protection of the laws," for all persons of the class, designated and described by the occupation in which they are engaged, are subject to the same specific tax. An agent, of the character indicated in the second headnote, of a domestic packing house would be just as liable to the tax as such an agent of a foreign packing house. Singer Manufacturing Co. *v.* Wright, *supra*.

4. Counsel for the defendant in error seem to attach much importance to the fact that the word "agents" is used in that part of the execution which describes the business which Kehrer was carrying on, instead of the word "agent." We think the mere use of the plural, instead of the singular, noun in this connection
55 immaterial, as the execution sufficiently described the business which the plaintiff in error, according to the showing made in his petition, was actually carrying on, viz., that of agent "of Nelson Morris & Co., a packing house doing business in this State."

It follows from the foregoing that the court erred in overruling the demurrer to the plaintiff's petition.

Judgment reversed. All the justices concurring, except Little and Lewis J. J., absent.

56 Supreme Court of the State of Georgia.

ATLANTA, GA., *April* 3, 1902.

The honorable supreme court met pursuant to adjournment. The following judgment was rendered:

A. P. STEWART
versus
F. E. KEHRER.

This case came before this court upon a writ of error from the city court of Atlanta; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in overruling the demurrer to the plaintiff's petition. All the justices concurring except Little and Lewis, JJ., absent on account of sickness.

Bill of costs, $10.00.

Supreme Court of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *Nov.* 28, 1903.

I certify that the above is a true extract from the minutes of the supreme court of Georgia, and that M. M. Jackson paid the above bill of costs.

Witness my signature and the seal of said court affixed the day and year last above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk.*

57 GEORGIA, }
Fulton County. }

Be it remembered that on the 28th day of June 1902, there came on to be tried in the city court of Atlanta, before his honor H. M. Reid, judge of said court, then and there presiding, the case of F. E. Kehrer against A. P. Stewart, said trial being had on the general demurrer of the defendant to the declaration of plaintiff as amended by an amendment duly allowed and filed on the 21st day of June 1902. After argument of counsel on said general demurrer same was sustained, and the court passed an order and judgment sustaining said demurrer and dismissing said case, as appears of record.

To which order and judgment sustaining said demurrer as aforesaid plaintiff then excepted and now excepts, and assigns error thereon, and says that the court erred in sustaining said general demurrer and dismissing said case, because said declaration as amended set forth a good cause of action.

And now within the time prescribed by law comes the plaintiff and tenders this his bill of exceptions, and specifies the following parts of the record as necessary to a clear understanding of the errors complained of, to-wit:

1. Plaintiff's original declaration, with date of filing and service.
2. The amendment to said declaration allowed and filed June 21st, 1902, together with the order thereon, date of filing and service.

58 3. The general demurrer of the defendant to said declaration as amended, filed June 28th 1902, and the date of filing.

4. The order and judgment of the court sustaining said demurrer and dismissing said case.

Wherefore, plaintiff prays this his bill of exceptions may be certified as provided by law in order that the errors herein complained of may be considered and corrected by the supreme court.

SMITH, HAMMOND & SMITH,
Plaintiff's Attorneys, Atlanta, Ga.

This the 7th day of July 1902.

I do certify that the foregoing bill of exceptions is true, and specifies all of the record material to a clear understanding of the errors complained of, and the clerk of the city court of Atlanta of Fulton county is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the October term 1902 of the supreme court, that the errors alleged to have been committed may be considered and corrected.

H. M. REID,
Judge C. C. A.

July 7, 1902.

Due and legal service of the within and foregoing bill of exceptions and writ of error acknowledged. Copy received and
59 all other and further service waived.

BLACK & JACKSON,
Att'ys for Defendant, A. P. Stewart.

This July 8, 1902.

STATE OF GEORGIA, }
Fulton County. }

ATLANTA, GA., *July* 14, 1902.

I hereby certify that the foregoing bill of exceptions, hereunto attached, is the true, original bill of exceptions, in the case stated, to-wit: F. E. Kehrer, plaintiff in error *vs.* A. P. Stewart T. C., defendant in error, and that a copy thereof has been made and filed in this office.

[SEAL.] Witness my signature and the seal of said court affixed, the day and year above written.

ARNOLD BROYLES,
Clerk City Court of Atlanta.

Endorsed: No. 36 Atlanta circuit, October term, 1902. Supreme court of Georgia. F. E. Kehrer *v.* A. P. Stewart, T. C. Bill of exceptions. Filed in office July 9, 1902. Arnold Broyles, clerk Filed in office July 14 1902 Logan Bleckley, D. C. S. C. Ga.

60 *Petition.*

City Court of Atlanta, May Term, 1901.

F. E. KEHRER
vs.
A. P. STEWART. } No. 12408.

STATE OF GEORGIA,
County of Fulton.

To the city court of Atlanta:

The petition of F. E. Kehrer against Andrew P. Stewart of said county shows to the court as follows:

1. Nelson Morris & Co. is a copartnership composed of Nelson Morris, Edward Morris and Ira N. Morris, citizens of the State of Illinois.

2. A packing house is a place where the business of slaughtering animals and dressing and preparing the products of their carcasses for food and other commercial purposes is carried on.

3. Said Nelson Morris & Co. do not anywhere within the State of Georgia slaughter, dress, cure, pack, or manufacture products of any animals for food or commercial use.

4. Said Nelson Morris & Co. have in the city of Atlanta said county, a place of business where at wholesale they sell fresh, cured and salt meats and the products that have been manufactured from the carcasses of slaughtered animals, and in said State and county conduct no other kind of business.

5. At their said place of business in Atlanta, said county,
61 there are eleven employees, that is, your petitioner, the bookkeeper, the assistant bookkeeper, the stenographer (who also acts as billing clerk), the shipping clerk, two salesmen, the man in charge of the cooler where the meats are preserved until sold, two drivers, and a laborer who boxes, wraps and crates goods for delivery as they are sold.

6. Each of said employees, including your petitioner, is only a clerk and employee of said Nelson Morris & Co. at Atlanta, and neither your petitioner nor any of said clerks has any interest in said business other than that of paid employees.

7. Your petitioner shows that on or about the 16th of June, 1900, he accepted employment with said Nelson Morris & Co., at Atlanta, Ga., his employment being fixed for no definite term, the agreement being that he was to be paid at the rate of $25.00 per week for the time actually employed and to be subject to be removed or discharged without notice.

8. Since June 16, 1900, your petitioner has been employed by said

firm at Atlanta, Ga. as their chief clerk and manager, and hopes to continue so employed during the year 1901.

9. Petitioner shows that at the last session of the General Assembly of Georgia, an act was passed, which was approved on the 21st day of December, 1900, to levy and collect a tax for the support of the State government and for other purposes expressed in its caption, for each of the fiscal years 1901 and 1902. Said tax
62 act assessed and levied an ad valorem tax of a certain per centum upon the taxable property in said State, for each of said years, and also provided for certain specific taxes for each of said years.

10. Among the specific taxes mentioned in said act is one covered by the 19th paragraph of section 2, in the following words:

"Upon all agents of packing houses doing business in this State two hundred dollars in each county where said business is carried on."

11. Said act in its 4th section enacted that said specific tax, with others should "be paid in full for the fiscal year for which they are levied, to the tax collectors of the counties where such vocations are carried on, at the time of commencing to do the business specified" in said paragraph 19 and other specified paragraphs.

12. In the same section 4 of the said act, it is further provided that "before any person taxed by paragraph 19 (and other enumerated paragraphs) of section 2 of this act shall be authorized to carry on said business, they shall go before the ordinary of the county in which they propose to do business, and register their names, place of business, and at the same time pay their taxes to the tax collector; and it shall be the duty of said ordinary to immediately notify the comptroller-general and the tax collector. Any person failing to register with the ordinary, or having registered, failing to pay the tax as herein required, shall be liable to indictment for misdemeanor, and on conviction, shall be fined not less than double the tax, or be imprisoned as prescribed by
63 section 1039 of vol. 3 of the Code of 1895, or both, in the discretion of the court. One half of said fine shall be applied to the payment of the tax, and the other to the fund of fines and forefeitures for the use of officers of court."

13. Petitioner shows that said defendant, Andrew P. Stewart, is the tax collector of the county of Fulton, and as such tax collector on the 26th day of February, 1901 in said county, issued a *fi. fa.* against petitioner, directed to the sheriffs and constables of this State, commanding them that of the chattels, lands and tenements of your petitioner they cause to be made, by levy and sale, the sum of $200. with interest and cost of *fi. fa.*, "the amount of specific tax due the State of Georgia for the year 1901 for carrying on the business in Fulton county of agents of Nelson Morris & Co., a packing house doing business in this State." A copy of the *fi. fa.* so issued is hereto attached and made a part hereof, marked Exhibit "A."

14. Petitioner shows that the said *fi. fa.* having been so issued,

said Stewart, tax collector and *ex-officio* sheriff of said county, assuming to act under authority of law, did on the 28th day of February 1901, call upon and demand of your petitioner that he pay to him the amount of said specific tax, to-wit, $200.00, besides $2.65 interest and $4.50 costs of *fi. fa.*

15. When called upon, your petitioner refused to pay said alleged specific tax, protesting that he was not liable therefor, and
64 did not come within its terms. Whereupon said Stewart as tax collector and *ex-officio* sheriff as aforesaid threatened to levy upon and to seize sufficient of your petitioner's property to make the amounts claimed under said *fi. fa.*, and at the same time notified your petitioner that unless he would pay said alleged tax and register with the ordinary of said county, as provided for in said sec. 4 of said tax act, he would cause an accusation to be sworn out charging your petitioner with a misdemeanor, and would arrest and imprison your petitioner and prosecute him.

16. While your petitioner did then and there deny that he was subject to the provisions of said act, asserting his nonliability to pay said tax, and protesting that he did not owe the same, yet in order to prevent the threatened levy and the immediate seizure of his property and person, he did on the 28th day of February, 1901, under said urgent and immediate necessity, and to prevent said seizure, pay to said Stewart, tax collector and *ex-officio* sheriff, the sum of $207.15, the same being for the alleged specific tax, $200.00 interest $2.65 and cost of *fi. fa.* $4.50, all as demanded by said Stewart; and at the same time took from the said Stewart as the levying officer a receipt, a copy of which is hereto attached, made a part thereof, and marked Exhibit "B."

17. Petitioner further shows that in order to prevent arrest and imprisonment in the common jail of said county, and to prevent being prosecuted as for a misdemeanor, he did, under duress
65 from said Stewart, and under protest, register with the ordinary of said county as required by said act, taking a certificate from said ordinary, a copy of which is hereto attached, made a part hereof, and marked Exhibit "C."

18. Petitioner avers that in the issuance of said *fi. fa.* and the threatened levy thereof, and the threatened seizure of petitioner's property and person, said tax collector, while claiming to act as an officer of Georgia, in pursuance of its laws, did act and is acting without authority of law and in defiance of law, which protects the legal rights of petitioner; and in said conduct does not represent the said State of Georgia in discharging the duties imposed upon him by the Constitution of the United States or the constitution of Georgia or the laws made pursuant thereto.

19. Of all the foregoing facts, said Stewart had notice before the issuance and threatened levy of said *fi. fa.* but wholly regardless thereof, did issue said *fi. fa.* and as *ex-officio* sheriff did enforce the collection of said specific tax under the same, as above stated, and

has thus forced your petitioner, in order to protect his person and property, to pay said sum so demanded of him.

20. The issuance of said *fi. fa.*, and all subsequent proceedings thereunder, were and are without authority of law, and were and are null and void; the said claim of $200, with interest and cost, against your petitioner, was no lawful claim; petitioner owed no such tax,
66 and there is no law requiring petitioner to pay said $200, with interest and cost, or any part thereof, and said tax was exacted of your petitioner illegally and without authority of law.

21. The constitution of the State of Georgia, under § 5883 of the Code of 1895, provides that "all taxes shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." The provisions of the 19th paragraph of sec. 2 of said tax act are obnoxious to this section of the constitution, for that said specific tax is not uniform upon the same class of subjects.

22. By the fourteenth amendment to the Constitution of the United States, as set out in § 6030 of the Code of Georgia of 1895, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within *the* jurisdiction the equal protection of the laws." The levy and collection of said specific tax from petitioner, as hereinbefore alleged, is a violation of the rights of petitioner under said 14th amendment of the Constitution of the United States, for that it deprives petitioner of the right to work for said Nelson Morris & Co. at Atlanta, Ga., and earn his livelihood thereby, without assuming the heavy burden of said tax, which is not imposed on other citizens of the United States occupying like positions with lawful business enterprises.

67 23. Your petitioner shows that he is a citizen of the United States and that he has no vocation or calling within the State of Georgia, nor does he on his own account nor as agent conduct or carry on any packing house business or any other business, except that he is a mere paid employee of Nelson Morris & Co., who are conducting and carrying on a lawful business in the city of Atlanta, in the manner as above set forth, and petitioner avers that under the Constitution of the State of Georgia, and of the United States, he has a perfect right to be so employed, without paying any special tax or fee therefor.

24. Your petitioner shows that for the year 1901 he is subject to and liable to pay only such specific taxes as any and all other clerks or employees of any other lawful business in which they may be employed in the State of Georgia are required to pay and an ad valorem tax on all property subject to be taxed within the territorial limits of the authority levying the tax, under general laws; and at the proper time and place for paying such specific tax as under the law he is liable to pay, he will pay to the State and county whatever

taxes he may legally owe. But petitioner avers that he does not now owe, nor can he be made at any time to owe any tax for the privilege of being a clerk or employee in the said business of Nelson Morris & Co. at Atlanta, Ga.

25. Petitioner avers that to exact of him the payment of said illegal specific tax, as a condition precedent to his accepting or a
68 condition subsequent to his enjoying employment as a clerk or employee of said Nelson Morris & Co., as above set forth, or in default thereof to subject his property to seizure, levy and sale, and his person to arrest and imprisonment and to subject him to criminal prosecution in the courts, of this State, would be to deprive him of the rights granted by the Constitution of the United States, and deprive him of his liberty and property without due process of law, and deny to him the equal protection of the law.

26. Petitioner avers that the attempted classification of subjects for specific taxation in said paragraph 19 of sec. 2 in said tax act is unreasonable, arbitrary, unnatural and artificial, and so far as it is attempted to apply the same to him, is unlawful, null and void.

27. Petitioner alleges that said Stewart, having collected the sums heretofore stated from his, now holds the same without authority of law, and fails and refuses to refund said sum or any part thereof to your petitioner, though often requested so to do.

28. The premises considered, petitioner alleges that said Stewart is guilty of a trespass against him in exacting money from him under the name of a tax, when there is no law to warrant the collection of the same, and such collection is not a collection of any tax, but the enforced demand and collection of money without authority of law, and in forcing your petitioner to pay to him the said sum of $207.15 and in the holding of the same, said Stewart has in-
69 jured and damaged your petitioner, and on the 26th day of February, 1901, became liable to pay your petitioner the damages done to him, to-wit: the sum of one thousand dollars, or other such large sum.

Wherefore your petitioner prays that process issue, requiring the said defendant Andrew P. Stewart to be and appear at the next term of said court, to answer your petitioner's complaint.

SMITH, HAMMOND & SMITH,
Petitioner's Att'ys.

EXHIBIT "A."

STATE OF GEORGIA, }
Fulton County. }

To all and singular the sheriffs and constables of this State, Greeting:

You are hereby required, that of the goods and chattels, lands and tenements of F. E. Kehrer you cause to be made by levy and sale sufficient thereof to make the sum of two hundred dollars, the

amount of specific tax due the State of Georgia for the year 1901, for carrying on the business in Fulton county of agents of Nelson Morris & Co., a packing house doing business in this State; also the further sum of fifty cents for this *fi. fa.*, and a sufficient amount to cover interest on said principal tax at the rate of seven per cent. per annum, from January 2, 1901, until settled, together with all
70 costs that may hereafter accrue; and have you the said sum of money to be paid to me upon collection thereof, to be rendered to the State the principal, interest and costs aforesaid, as required by law, and have you then and there this writ.

Given under my hand and official signature this 26th day of February 1901.

A. P. STEWART, [L. S.]
Tax Collector, Fulton County.

EXHIBIT "B."

GEORGIA, }
Fulton County. }

Whereas, A. P. Stewart, tax collector of Fulton county, Georgia, has issued an execution dated 26th day of February, 1901, against F. E. Kehrer to make the sum of two hundred ($200.00) dollars with interest, and costs for specific tax due the State of Georgia for the year 1901 for carrying on the business in said county as agents of Nelson Morris & Co., a packing house doing business in this State, and whereas, said execution has been duly placed in the hands of the undersigned levying officer for enforcement and the same has been presented to the said defendant, and payment demanded, and refused, and whereas, the undersigned officer was about to immediately levy said execution upon and seize the property of the said defendant, and the said defendant under an urgent, and immediate necessary, and to prevent the said seizure, and protesting that
71 he was not, and is not liable to pay the said tax, did pay the same under duress as aforesaid.

Now I do hereby acknowledge receipt from F. E. Kehrer of the sum of two hundred (200) dollars principal, $2,65 interest, and $4.50 costs in full of the said execution, said amount to be entered in my return on the said execution and accounted for to the said tax collector, the same being paid under the circumstances above recited. This 28th day of Feb. 1901.

A. P. STEWART,
Tax Collector and Ex-officio Sh'ff.

EXHIBIT "C."

GEORGIA, }
Fulton County. }

I, John R. Wilkinson, ordinary in and for said county do hereby certify that F. E. Kehrer of said county who has this day registered before me under provisions of section 4 of the general tax act of 1901–1902, did so under protest, contending that he was and is not subject to the terms and provisions of said act, and registers only because the tax authorities insist that he is subject, and threaten to prosecute him for a misdemeanor if he fails to register.

Feb'y 26th, 1901.

JOHN R. WILKINSON, *Ordinary.*

Filed in office this 6th day of April 1901.

R. S. McFARLIN, *D. Cl'k.*

72 Due and legal service of the within petition acknowledged and copy received. Process, copy process and all further service waived. This April 6th, 1901.

EUGENE R. BLACK,
Att'y for Defendant.

Amendment.

STATE OF GEORGIA, }
County of Fulton. }

Now comes the plaintiff in said case by leave of the court and before judgment is entered on the remittiter of the supreme court in said case and amends his declaration heretofore filed therein, by adding thereto the following paragraphs, to wit:—

29. Under the construction of the act of the General Assembly of Georgia hereinbefore referred to, as announced by the supreme court of Georgia in its decision of this case on writ of error, the special tax of two hundred ($200.00) dollars per annum levied under paragraph nineteen (19) of section two (2) of said act applies to plaintiff alone among the eleven employees of Nelson Morris & Co. enumerated in paragraph five of plaintiff's original declaration.

30. The enforced collection of said special tax from plaintiff, in the manner set forth in plaintiff's original declaration, under this act, by the terms of which, as construed by the supreme court of Georgia as aforesaid, no like tax can be required of any of
73 the other ten employees of Nelson Morris & Co. all of whom like plaintiff, are only clerks and employees of said Nelson Morris & Co. and without other interest in said business, as alleged in paragraph six of plaintiff's original declaration, deprives plaintiff

of his property without due process of law, in violation of paragraph one (1) of article fourteen (14) of the amendments to the Constitution of the United States, commonly known as the fourteenth amendment of said Constitution.

31. The denial to plaintiff of the right to lawfully accept and retain employment with said Nelson Morris & Co. in the manner fully set forth in plaintiff's original declaration, without exacting of plaintiff the payment of said specific tax of two hundred ($200.00) dollars as levied in said tax act, under the terms of which, as construed by the supreme court of Georgia as aforesaid, such right is not and can not be denied and such tax is not and cannot be exacted of any of the other employees of Nelson Morris & Co. enumerated in paragraph five of plaintiff's original declaration, each of whom, like petitioner, is only a clerk and employee of the said Nelson Morris & Co. and without other interest in said business, as alleged in paragraph six of plaintiff's original declaration, is a denial to plaintiff, a citizen of the United States and within its jurisdiction, of the equal protection of the laws, in violation of paragraph one of the article fourteen (14) of the amendment to the Constitution of the United States, commonly known as the fourteenth (14) amendment of said Constitution.

74 32. To compel plaintiff to go before the ordinary of Fulton county, Georgia, and register his name and place of business, before accepting and retaining employment with said Nelson Morris & Co. in the manner and for the tenure, in said original declaration fully set out, under pain and penalty of a misdemeanor under the terms of said act as construed by the supreme court of Georgia, as aforesaid, when such compulsion and pain and penalties are not and cannot be put upon any of the other employees of said Nelson Morris & Co. each of whom, like plaintiff is only a clerk and employee of said Nelson Morris & Co. and without other interest in said business, as in said original declaration set out, is to deprive plaintiff of his liberty in the enjoyment of his faculties and the use of them in a lawful way, of his liberty to live and work where he will, of his liberty to earn his livelihood by a lawful calling, of his liberty to pursue a livelihood or vocation, and of his liberty to enter into a contract which is proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned, and the making and enforcement of said law, as construed by the supreme court of Georgia as aforesaid, against this plaintiff as aforesaid, when same is not and cannot be enforced against his co-employees as aforesaid, abridges the privileges and immunities of plaintiff, who is — citizen of the United States. All of which is in violation of paragraph one (1), article fourteen (14) of the amendments to the Constitution of the United States, commonly

75 known as the fourteenth (14) amendment to said Constitution.

33. Plaintiff was at the time this suit was brought, and when said tax act was passed, on December 21, 1900, and had been since the 16th day of June 1900, an employee of said Nelson Morris

& Co. under a contract of employment between plaintiff and said Nelson Morris & Co., whereby plaintiff was to be paid the sum of twenty-five ($25.00) dollars per week for his services as chief clerk and manager at the place of business of said Nelson Morris & Co. in the city of Atlanta, Fulton county, Georgia, aforesaid, said tax act of December 21, 1900, as construed by the supreme court of Georgia as aforesaid, converted said contract of employment into a vocation or occupation pursued by plaintiff, and plaintiff is himself declared to be doing business in this State by reason of said contract of employment, and said contract is itself impaired by the compulsory requirements sought to be put upon plaintiff under the terms of said act, whereby plaintiff is required under pains and penalties of a misdemeanor to register his name and place of business and pay a special tax of two hundred ($200.00) dollars before he can continue in the enjoyment of said employment by said Nelson Morris & Co. under said contract so made on June 16, 1900, as aforesaid. By reason of which, plaintiff alleges that said act as construed by the supreme court of Georgia as aforesaid, is in violation of paragraph one (1), section ten (10), article one (1) of the Constitution of the United States, providing that no State shall pass any *ex post*
76 *facto* law or law impairing the obligation of contracts.

34. The tax act aforesaid, as construed by the supreme court of Georgia as aforesaid, creates a class for the imposition of said two hundred ($200.00) dollars tax aforesaid, composed of managing and superintending agents who are the *alter ego* of the principal, such principal being a packing house doing business in this State through such managing and superintending agents. Said act, as so construed does not make managing and superintending agents for any other sort of principal liable for said tax. The business, for conducting which the tax is imposed, is the pursuit of the vocation or occupation of employment as such managing and superintending agent, and not the business of the principal who employs such an agent. Plaintiff alleges that there are many lines of business conducted in Georgia through managing and superintending agents, such as the business of wholesale and retail dry-goods, shoes, hats, notions, hardware, groceries, railway supplies, and publishing houses. Such managing and superintending agents are in many cases employed on salaries, as is plaintiff, and are as much engaged in a business of their own as is plaintiff, that is, pursuing the vocation or occupation of accepting and retaining employment for stipulated salaries as superintending and managing agents. The fact that the one may be an agent for a dry goods house, the other for a show house the other for a grocery house does not differentiate the vocation or occupation, as specified in said act, as con-
77 strued by the supreme court of Georgia, as aforesaid, of any one of such agents from another, or from that of plaintiff as agent of a packing-house. But said tax act does not attempt to levy this tax on this occupation or business on any such agent except agents for packing-houses. Plaintiff alleges that said act for this

reason is in violation of the constitution of Georgia, article seven (7) section two (2), paragraph one (1), providing that all taxation shall be uniform upon the same class of subjects. Plaintiff further alleges that said act is for the same reason in violation of paragraph one (1), article fourteen (14), of the amendments to the Constitution of the United States, commonly known as the fourteenth amendment to the Constitution of the United States, in this that the privileges and immunities of the plaintiff as a citizen of the United States are abridged, and plaintiff is thereby deprived of his property and of his liberty without due process of law and the equal protection of the law is thereby denied to plaintiff.

35. Plaintiff, as chief clerk and manager as aforesaid is one of the agencies of said Nelson Morris & Co. who employ him in the prosecution of their business. Said Nelson Morris & Co. are engaged in the business of curing and packing meats for commerce and, as part of their business, they ship to other States in the United States meats and the products thereof to be sold to customers calling for same.

As a necessary part of this last mentioned department and as an instrument for carrying on said inter-state commerce, said
78 company necessarily has a place in the State of Georgia, to-wit Atlanta, Fulton county, where said meats and the products thereof are put and temporarily held for sale, and as another part in the conduct of said business, it employs your petitioner as its chief clerk and manager, who, in connection with the other employees and agencies in the original declaration set out, were at the time said act was passed and ever since have been conducting the business of Nelson Morris & Co. at its place of business in the city of Atlanta, Georgia, for the sale and distribution of the products of the packing house of Nelson Morris & Co. shipped from said packing house to Atlanta, Georgia.

All these products are manufactured and prepared for market in the State of Illinois and shipped to the various business places of said Nelson Morris & Co. in the United States, including the said house at Atlanta, Georgia:

In most cases, said goods are sold at or before the day of their shipment when received in Atlanta, delivered in the original packages to the purchasers of said goods; and in all cases, title to the goods remains in said Nelson Morris & Co. until sold and delivered to their customers. The rest of said goods so shipped to Atlanta, Georgia, are stored in their place of business at Atlanta in the original form and package as when shipped and delivered and there temporarily remains until in due course of trade the same can be disposed of.

The indebtedness due for goods so sold and delivered is the
79 property of said Nelson Morris & Company and the proceeds thereof are remitted and belong to said Nelson Morris & Co. and said Nelson Morris & Company advances to its employees at

Atlanta, Georgia, funds sufficient to defray the expenses of conducting said business.

Petitioner avers that either he or some other person in a similar position to him is a necessary agent and agency in the conducting of said business of Nelson Morris & Company at Atlanta, Georgia.

Petitioner alleges that said business of Nelson Morris & Co. so conducted through him and its other employees and agencies at Atlanta, Georgia, is interstate commerce and the levy of the special tax of $200.00 under said act of 1900 is a direct tax upon interstate commerce and the necessary agencies employed therein, and the provision of said act requiring petitioner to register before the ordinary of said county, and pay said special tax of $200.00 as a condition precedent to acting as chief clerk or manager at the business place of Nelson Morris & Company in Atlanta, Georgia, are regulations of interstate commerce.

Petitioner alleges that said act of the legislature of the State of Georgia, approved December 21, 1900, and known as the general tax act of the year- 1901 and 1902, as heretofore referred to, is void in so far as it undertakes in paragraph nineteen of section two to levy a tax "upon all agents of packing houses doing business in this State, $200.00 in each county where said business is carried on," and in section four, requiring said chief clerks or managers or
80 agents to go before the ordinary and register their names, their places of business, because said act is an unconstitutional interference with some of the necessary instruments and means of carrying on said commerce between the several States, and in so far as that statute or any other statute of Georgia would try to authorize or command the same, such statutes would be and are contrary to the provisions of the Constitution of the United States and void, because the States of the United States, and no power but the Congress of the United States can "regulate commerce among the several States," and the commerce above mentioned is commerce among the several States, as provided under clause three of section eight of article one of the Constitution of the United States.

36. Petitioner alleges that said Nelson Morris & Company in order to dispose of the products shipped from its packing house in the State of Illinois to the said city of Atlanta in inter-state commerce, it is necessary for said Nelson Morris & Company to have a place of business in the city of Atlanta, where said packing house products can be stored and preserved until sold and delivered, and it is also necessary as part of said inter-state commerce that said Nelson Morris & Co. should have in its employ and at its place of business, at Atlanta, Georgia, some person acting in the capacity of its chief clerk and manager as does your petitioner. And petitioner alleges that neither he nor any other person acting in said capacity could be employed by said Nelson Morris & Company to so act as
81 chief clerk or manager, unless said Nelson Morris & Company would pay for said chief clerk or manager the specific tax of $200.00 per annum required of said agents, either by paying the

same for your petitioner or by making the advances in the wages of your petitioner that would authorize payment of said specific tax.

Petitioner alleges that while said act purports on its face to levy and exact a tax of him as an individual for the privilege of acting as chief clerk and manager at the place of business of said Nelson Morris & Company at Atlanta, Georgia, in truth and in fact and in the practical operation and enforcement of said act, the exaction of said tax and the payment of the same is of said Nelson Morris & Company and is a tax on the business of said Nelson Morris & Company, which business is that of inter-state commerce among the several States and in violation of the Constitution of the United States.

Wherefore, petitioner alleges that said act is an interference with the exclusive power of the Congress of the United States "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes" as provided in clause three (3) of section eight (8) of article one (1) of the Constitution of the United States; and said act of the legislature of Georgia as applied to the occupation of this plaintiff is contrary to said section of the Constitution of the United States, in violation thereof, and therefore unconstitutional and void.

SMITH, HAMMOND & SMITH,
Att'ys for Plaintiff.

82 This amendment allowed, to be filed subject to demurrer. June 21, 1902.

H. M. REID, *Judge.*

Due and legal service acknowledged, of the foregoing amendment and order. This June 21, 1902.

BLACK AND JACKSON,
Att'ys for Defendant.

Filed in office this the 21st day of June, 1902.
F. M. MYERS, *D. Cl'k.*

Demurrer.

STATE OF GEORGIA,
County of Fulton.

Now comes the defendant in the above stated case by his attorneys Black and Jackson, and demurs to the petition of the plaintiff in the above stated case, as amended, and says that said petition as amended sets forth no cause of action.

Wherefore defendant prays that said petition be dismissed and that he be given judgment for costs against the plaintiff.

BLACK AND JACKSON,
Att'ys for Def't.

Filed in office this the 28th day of June, 1902.
F. M. MYERS, *D. Cl'k.*

83 *Order.*

This demurrer coming on to be heard, it is ordered that this demurrer be sustained, and this case dismissed, with cost against plaintiff. This June 28, 1902.

H. M. REID,
Judge City Court of Atlanta.

Superior Court of Fulton County, City Court of Atlanta, Criminal Court of Atlanta.—Arnold Broyles, Clerk.

I hereby certify, that the foregoing pages, hereunto attached, contain a true transcript of such parts of the record as are specified in the bill of exceptions and required, by order of the presiding judge of city court of Atlanta to be sent to the supreme court in the case of F. E. Kehrer, plaintiff in error, *v.* A. P. Stewart, defendant in error.

I further certify, that the —— term of said court, at which said case was tried, adjourned —— 190–. All of which appears from the records and minutes of said court.

[SEAL.] Witness, my signature and the seal of said court, affixed this, the 14 day of July 1902.

ARNOLD BROYLES,
Clerk of Superior Court of Fulton County and Ex-officio Clerk City Court of Atlanta and Criminal Court of Atlanta.

84 Endorsed: No. 36 Atlanta circuit, October term, 1902. Supreme court of Georgia. F. E. Kehrer *vs.* A. P. Stewart, T. C. Transcript of record. Filed in office Jul- 14, 1902 Logan Bleckley, D. C. S. C. Ga.

85 36, Atlanta, Oct., 1902.

KEHRER
v.
STEWART.

1. A legislative act which imposes a specific tax on certain business occupations and which does not become operative until the commencement of the year following its passage is not retroactive or violative of that section of the Federal Constitution which forbids a State's passing any *ex post facto* law or law impairing the obligation of contracts.
2. A tax on the privilege of selling goods is, in effect, a tax on the goods themselves.

3. One who in this State, as the agent of a principal residing in another State, takes orders on such principal for the purchase of goods held in such other State and who, when the goods are shipped by his principal to him, receives them in this State and delivers them in the original packages to the customers from whom he obtained the orders, and upon delivery receives from them the price of the goods, is engaged in interstate commerce.
4. When goods, the property of a resident of another State, are shipped from that State to the owner's place of business in this State, there to be stored and offered for sale in open market by his agent, the business of selling them in this State is not interstate commerce, but is subject to taxation by the
86 State. The Constitution of the United States protects such goods only to the extent of preventing State legislation which imposes on them, because of their origin, burdens which are not imposed upon goods the product of the State imposing such burdens.
5. One who is subject to a specific occupation tax by reason of his conducting, for another, a domestic business within this State, is not rendered exempt from such tax because he also conducts, for the same principal, other business which is not subject to State taxation.

SIMMONS, *C. J.:*

Suit was brought by Kehrer against Stewart, in the city court of Atlanta. This suit was based upon the exaction by the defendant, who was tax-collector of the county, of a specific tax assessed against petitioner as agent, in Fulton county, "of Nelson Morris & Co., a packing-house doing business in this State." This tax was alleged to be illegal, and void as applied to the petitioner, who had paid it under protest and to prevent the immediate seizure of his property and person. A demurrer to the petition was overruled, and Stewart brought the case to this court, where the judgment was reversed. An amendment to the petition was then made in the lower court, and allowed. The demurrer was renewed, and the court sustained the same. To this judgment Kehrer excepted. The substance of the original petition is stated in 115 Ga. 184. The amendment, without stating any new facts pertinent thereto, contained
87 several reasons or arguments to show that the exaction of the tax from the petitioner was contrary to the fourteenth amendment to the Constitution of the United States, in that it deprived him of his property without due process of law, was a denial to him of the equal protection of the laws, and abridged his privileges; and also to show that the act imposing this tax was violative of the constitution of this State in that the tax was not uniform, but based upon an unjust and arbitrary classification. With these questions we do not now deal. They were raised and passed upon when the

case was here before, and have been adjudicated against the petitioner. He can not review the former decision or reopen a binding adjudication by adding to his petition a detailed argument of the points already made and decided. We shall, therefore, confine our discussion to the questions made by the amendment which were not passed upon before and which are therefore not *res judicatæ*. These questions are, (1st) whether the act imposing the tax is *ex post facto*, or impairs the obligation of contracts; and (2d) whether the act is an illegal interference with interstate commerce.

1. The statutory enactment under discussion imposed a specific tax "upon all agents of packing-houses doing business in this State," and made penal the pursuit of such an occupation by any one who had not paid the tax, which was $200 per annum. Some five months before the passage of the act, the petitioner entered
88 into a contract of employment with Nelson Morris & Co., under which he was to be paid a stipulated sum per week for his services as chief clerk and manager of their house in Atlanta, Georgia. Under these facts, the statute is clearly not retroactive as applied to petitioner, nor can we see how it can be regarded as in any sense retroactive. It does not relate to any act or acts done prior to its passage, but only to the pursuit of the designated occupation, after the commencement of the year following the passage of the act, by one who has failed to pay the tax imposed for the year in which he engages in that occupation. Nor is the petitioner's contract violated. In the first place, it appears that his contract is not for any definite term. He is subject at any time to be discharged without notice, and he was apparently under no obligation to continue his services after the imposition of the tax on his occupation. But even were this not true, the statute would not be objectionable as impairing the obligation of his contract. The State has, generally, a right to impose taxes upon occupations. One who lives in a State, and pursues therein an occupation which is not taxed, is bound to know that the legislature may at any time, in the exercise of legislative discretion and power, impose a reasonable tax upon his occupation. He can not, merely by contracting with other private persons to continue to pursue his occupation, deprive the legislature and the State of the right to raise revenue by taxing his occupation. If the tax is in other respects constitutional, it can not be
89 held invalid merely because it adds to his expenses an item which he, not foreseeing a change in legislative policy, had not anticipated when he entered into the contract.

2, 3, 4. The ground principally relied upon was that the tax was an illegal interference with interstate commerce. From the petition as amended it appeared that Nelson Morris & Co. are a partnership composed of citizens of the State of Illinois; "a packing-house is a place where the business of slaughtering animals and dressing and preparing the products of their carcasses for food and other commercial purposes is carried on;" Nelson Morris & Co. "do not anywhere within the State of Georgia slaughter, dress, cure, pack, or

manufacture products of any animals for food or commercial use;" they have in Atlanta a place of business where at wholesale they sell fresh, cured, and sale meats and the products that have been manufactured from the carcasses of slaughtered animals, but conduct at that place no other kind of business; petitioner had no interest in the business other than that of a paid employee; he was the chief clerk and manager of the Atlanta place of business before the passage of the act imposing the tax, and continues to fill the same position; petitioner, as chief clerk and manager or superintending agent, is one of the agencies of Nelson Morris & Co., who are engaged in the business of curing and packing meats for commerce and who, as part of their business, ship to other States in the United States meats and the products thereof to be sold to customers calling for same; as a necessary part of this last-mentioned
90 department they have a place of business in Atlanta where meats and the products thereof are put and temporarily held for sale, and as another part in the conduct of their business they employ petitioner as chief clerk and manager, who, in connection with the other employees, conducts the business in Atlanta of selling and distributing the products of the packing-house of Nelson Morris & Co., shipped from the packing-house to Atlanta. "All these products are manufactured and prepared for market in the State of Illinois and shipped to the various business places of said Nelson Morris & Co. in the United States, including the said house at Atlanta, Georgia. In most cases said goods are sold at or before the day of their shipment, and, when received in Atlanta, delivered in the original packages to the purchasers of said goods; and in all cases title to the goods remains in said Nelson Morris & Co. until sold and delivered to their customers. The rest of said goods so shipped to Atlanta, Georgia, are stored in their place of business at Atlanta in the original form and package as when shipped and delivered, and there temporarily remain until in due course of trade the same can be disposed of." In order for Nelson Morris & Co. to dispose of the products shipped from its packing-house in Illinois to the city of Atlanta, it is necessary for them to have a place of business in Atlanta where such packing-house products can be stored and preserved until sold and delivered, and to have in their employ at their place of business in Atlanta some person acting in
91 the capacity of chief clerk and manager, as does petitioner. While the statute purports to impose a tax on petitioner as an individual, the tax is in fact on the company which employs him, and is therefore on the business of that company. For these reasons the petition claimed that the statute imposing the tax was an interference with the exclusive power of Congress to regulate interstate commerce, was violative of the Constitution of the United States, and was void as against petitioner. The demurrer filed by the defendant was a general one to the effect that the petition set out no cause of action.

It is well established and sound law that where the burden of a

tax falls on the thing which is the subject of taxation, the tax is to be regarded as laid on the thing rather than on the individual who is charged with the duty of paying it into the treasury. Brown *v.* Maryland, 12 Wheat. 419. A tax or charge for a license to sell goods is, in effect, a tax on the goods themselves. Welton *v.* Missouri, 91 U. S. 275. A sale, to a customer in this State, of goods which are in another State, to be delivered to a common carrier for shipment to him, is interstate commerce. Following the recent case of Caldwell *v.* North Carolina, 23 Sup. Ct. 229, this court has held that "one who in this State, as the representative of a principal residing in another State, takes orders on such principal for the purchase of goods held in such other State, and who, when the goods are shipped by his principal to him, receives them in this State, breaks the original packages in which they are contained,
92 and distributes them among the customers from whom he obtained such orders, and upon delivery receives from them the price of the goods, is engaged in interstate commerce." Stone *v.* State, this term, 117 Ga. 43 S. E. 740. Under these rulings, by which we are bound, that part of Nelson Morris & Company's business which consisted in shipping goods to Atlanta to fill orders previously received, the goods being delivered in accordance with such orders, was interstate commerce. It was, therefore, not subject to taxation or interference by the State, and an act seeking to impose any tax upon such a business would be unconstitutional and void. The occupation of the plaintiff in error as agent for the conduct of this part of the business is so closely and directly connected therewith that, in so far as the tax act seeks to tax him as such agent, the act is void.

From the petition, however, it appears that Nelson Morris & Co. are engaged also in a business which is subject to State taxation and control. Where property has been brought into a State and has become itself subject to taxation therein, its sale in such State is not commerce between the States but is purely intrastate. "While it is exclusively the province of Congress to regulate commerce between the several States, and to protect the same from hostile State legislation, yet when products are shipped from one State and lodged in another, there to be offered for sale in open market, the business of selling them there is no longer interstate commerce, but assumes a domestic character and becomes subject to the laws of taxation of
93 force in the State where such business is pursued. The property involved in the conduct of this business, having become intermingled with the general mass of property in the State, has itself become subject to taxation there; and, upon principle, the business of selling it is alike taxable in that jurisdiction. Singer Mfg. — *v.* Wright, 97 Ga. 114, 122. Coal shipped from Pennsylvania to New Orleans and there put up for sale "had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become part of the general

mass of property in the State, and as such it was taxable." Such a tax, when not discriminating against goods the product of other States, is not a regulation of interstate commerce. Brown *v.* Houston, 114 U. S. 622. See also Emert *v.* Missouri, 156 U. S. 296. From the petition it appears that a portion of the meats and other packing-house products handled by the petitioner were shipped to Atlanta without any previous sale or contract to sell. They were, in the original form and package, stored in the Atlanta house of Nelson Morris & Co., and there preserved and held for sale in due course of trade. This part of the business was subject to State taxation. As to this part Nelson Morris & Co., through the petitioner as their manager, were running a branch house in Atlanta and there carrying on a domestic business. The goods were offered for sale to whomsoever might buy, and, until sale,
were stored and preserved. Such a business is not free from
94 State taxation as interstate commerce, though the title to the goods be in non-residents who have shipped the goods to the branch house for sale. Of course "it is true," as was said by Lumpkin, J, in Singer Mfg. Co. *v.* Wright, *supra*, "that where property has been shipped from one State to be sold in another, the business of conducting sales of it would be protected from local legislation burdening it with a tax not imposed upon the same business carried on in articles produced within the State levying the tax." See also Machine Co. *v.* Gage, 100 U. S. 676; American Harrow Co. *v.* Shaffer, 68 Fed. 757. When goods are brought from one State into another to be offered for sale and are commingled with the property of the latter, their sale is not interstate commerce and the power of the Federal Government protects them only to the extent of preventing discriminating State legislation which imposes burdens on such goods because of their origin. The statute here involved does not make any discrimination against packing-house products brought in from other States, but imposes the tax upon all agents of packing-houses, foreign or domestic, doing business in this State, whether they deal in products of this or of other States. Petitioner, as managing agent, is conducting two kinds of business. One of these has to do with interstate commerce, and can not be taxed by the State; the other is domestic, and is subject to State taxation. Can he be required to pay the tax imposed by the tax act?

5. Counsel for the plaintiff in error relied upon the case of
95 Leloup *v.* Port of Mobile, 127 U. S. 640, contending that the tax on the agent affected the whole of the business of Nelson Morris & Co. in this State, and that, therefore, the tax could not be legally collected even though a small part of this business were subject to taxation. We think that the case just cited is not applicable. Congress, by an act passed in 1866, had declared that the erection of telegraph lines should, as against State interference, be free to companies which accepted the terms and conditions of the act, and that a telegraph company of one State should not, after accepting them, be excluded by another State from prosecuting its business within

her jurisdiction. It was held, not only that the interstate business of such a company was exempt from taxation, but that the company had become an agent of the United States, and that the business it did for the Federal Government was in the nature of postal service and beyond the taxing power of the State. The tax which was held to be unconstitutional sought to prohibit a telegraph company, operating under the act of 1866, from doing any business within the State without first paying a specific tax and procuring a license. The court decided that this tax affected the entire business of the company, that which was interstate as well as that which was domestic, that which was done for the Government as well as that which was done within the State for private persons. Under this decision, the domestic private business, even of a telegraph company which has accepted the provisions of the act of Congress, is
96 still subject to taxation by the State. The imposition of a specific license tax upon such of a telegraph company's business as is not interstate is valid although it is imposed upon a company which does interstate business also. Postal etc. Co. *v.* Charleston, 153 U. S. 692. "A single tax, assessed under the laws of a State upon receipts of a telegraph company which were partly derived from interstate commerce and partly from commerce within the State, and which were capable of separation but were returned and assessed in gross and without separation or apportionment, is invalid in proportion to the extent that such receipts were derived from interstate commerce, but is otherwise valid." Ratterman *v.* Western Union Tel. Co., 127 U. S. 411. See also Western Union Tel. Co. *v.* Alabama, 132 U. S. 472. The act involved in the present case imposes a tax on the agents of packing-houses which do business in the State. It is unconstitutional only to the extent that it seeks to tax interstate commerce. To that extent it is invalid, and the plaintiff in error would not have been subject to the tax at all had he confined himself to interstate business. He is, however, agent for a concern which is doing domestic business in this State and as such agent he is subject to the tax. He is not relieved from paying the tax because he, *in addition*, does an interstate business which is not taxable. As well might a real estate agent seek to evade the payment of a lawful municipal tax on his occupation because, forsooth, he also practiced law and lawyers are not, in this State, taxable as such by municipal corporations. If
97 a man is embarked in a business on which a tax is properly imposed, he may avoid the tax by desisting in due time from the prosecution of such business. If he continue in the business, he cannot render it or himself exempt from taxation by adding to his original occupation another which is not subject to taxation. Nor does it matter that in the present case "most" of the business in which plaintiff in error is engaged is interstate. Agents of Georgia packing-houses have to pay the prescribed tax, while this is escaped by the agents of packing-houses in other States which do in this State a business which is interstate commerce. Suppose a packing-

house of another State should in this State operate a business which was purely domestic, could it be seriously contended that such a concern should be exempt from State taxation? Suppose its business was domestic except when it shipped special goods into this State on special orders which could not be filled from the stock regularly kept here, could it be held exempt from an occupation tax here because such part of its occupation consisted of interstate business? And if the business is taxable when it is principally domestic, what would be the law when it is half domestic and half interstate? What when "most" of the business is interstate and the remainder domestic? The true rule is that when one does any business which is subject to an occupation or privilege tax by the State, he is subject to any tax which the State may lawfully impose thereon, irrespective of what other business or occupation he may have.

98 If he would escape the tax, let him avoid the business which is subject to the tax and confine himself to that which is not. If he would continue to pursue the taxed business, let him pay the tax which is imposed upon all who are engaged therein. He cannot continue in that business and, by engaging also in another and nontaxable business, create an exemption for himself, and thus outstrip those of his competitors who still follow the taxed business only. We conclude that the plaintiff in error is subject to the tax imposed by the tax act upon the agents of packing-houses which do a domestic business within this State, and that the demurrer was properly sustained.

Judgment affirmed. By five justices.

99 Supreme Court of the State of Georgia.

ATLANTA, GA., *May* 30, 1903.

The honorable supreme court met pursuant to adjournment. The following judgment was rendered:

F. E. KEHRER
versus
A. P. STEWART.

This case came before this court upon a writ of error from the city court of Atlanta; and after argument had, it is considered and adjudged that the judgment of the court below be affirmed, all the justices concurring, except Lumpkin, P. J., absent on account of sickness.

Bill of costs, $10.00.

Supreme Court of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *Nov.* 28, 1903.

I certify that the above is a true extract from the minutes of the supreme court of Georgia, and that Smith, Hammond & Smith paid the above bill of costs.

Witness my signature and the seal of said court affixed the day and year last above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk.*

100 Clerk's office, supreme court of Georgia.

ATLANTA, GA., *Nov.* 28, 1903.

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the entire record in the case of F. E. Kehrer, plaintiff in error, *vs.* A. P. Stewart, defendant in error, as appears from the records and files of this office; and also the original writ of error and citation from the Supreme Court of the United States in said case together with copies of the assignments of error, petition and prayer for reversal and of the bond of the said plaintiff in error.

Witness my signature and the seal of the supreme court of Georgia hereto affixed, the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Clerk Supreme Court of Georgia.

Endorsed on cover: File No. 19,148. Georgia supreme court. Term No. 152. F. E. Kehrer, plaintiff in error, *vs.* A. P. Stewart. Filed December 2nd, 1903. File No. 19,148.

SUPREME COURT OF THE UNITED STATES.

F. E. KEHRER,
Plaintiff in Error,
vs.
A. P. STEWART,
Defendant in Error.

No. 152.
October Term, 1904.
In Error to the Supreme Court of the State of Georgia.

STATEMENT OF THE CASE.

This case comes up under writ of error to the Supreme Court of Georgia on final judgment upholding the constitutionality of the Tax Act of 1900 as applied to the plaintiff in error. The act in question so far as applicable to the present case is as follows:

GENERAL TAX ACT FOR 1901-1902.

No. 175.

"An act to levy a tax for the support of the State government and the public institutions; for educational purposes in instructing children in the elementary branches of an English education only; to pay the interest on the public debt; and to pay maimed Confederate soldiers and the widows of Confederate soldiers such amounts as are allowed them by law for each of the fiscal years 1901 and 1902; to prescribe what persons, professions and property are liable to taxation; to prescribe the methods of collecting and receiving said taxes; to prescribe the methods of ascertaining the property of the State subject to taxation; to prescribe additional questions to be propounded to taxpayers, and to provide penalties and forfeitures for non-payment of taxes; to prescribe how the oath of taxpayers shall be administered, and provide penalties for violation thereof, and for other purposes."

* * * * * * * * *

"Sec. 2. Be it further enacted by authority aforesaid, That in

addition to the *ad valorem* tax on real estate and personal property, as required by the Constitution and provided for in the preceding section, the following specific taxes shall be levied and collected for each of said fiscal years."

* * * * * * * * *

"Nineteenth. Upon all agents of packing-houses doing business in this State, two hundred dollars in each county where said business is carried on."

* * * * * * * * *

"Sec. 3. Be it further enacted by the authority aforesaid, That the taxes provided for in paragraphs 1 and 2 of section 2 of this act shall be returned to the tax-receiver in the county of the residence of the person liable to such tax, and shall by the receiver of tax returns be entered upon his digest of taxable property, and that the taxes provided for in paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, *19*, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32 of section 2 of this act shall be returned and paid to the tax collectors of the counties where such vocations are carried on."

"Sec. 4.—Be it further enacted by the authority aforesaid, that the taxes provided for in paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, *19*, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32 of section 2 of this act shall be paid in full for the fiscal years for which they were levied to the tax-collectors of the counties where such vocations are carried on at the time of commencing to do business specified in said paragraphs. Before any person taxed by paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, *19*, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32 of section 2 of this act shall be authorized to carry on said business they shall go before the ordinary of the county in which they propose to do business and register their names, places of business, and at the same time pay their taxes to the tax-collector; and it shall be the duty of said ordinary to immediately notify the Comptroller-General and the tax-collector. Any person failing to register with the ordinary,

or having registered, failing to pay the tax as herein required, shall be liable to indictment for misdemeanor, and on conviction, shall be fined not less than double the tax or be imprisoned as prescribed by section 1039 of Volume III of the Code of 1895, or both, in the discretion of the Court. One half of said fine shall be applied to the payment of the tax, and the other to the fund of fines and forfeitures for use of officers of Court."

The case originated in the city court of Atlanta by plaintiff in error bringing suit to recover the amount of tax exacted of him under said law. The original declaration in this suit raised a Federal question by alleging the act to be in violation of the 14th Amendment to the Constitution of the United States. Record pp. 19 (38) and 20 (39).

Defendant interposed a general demurrer which was overruled and this judgment was reversed on writ of error from the Supreme Court of Georgia. Record, p. 28 (56).

In this decision the act was construed to apply only to managing-agents of packing-houses, and only one such agent at each place of business, and that the tax was imposed upon the agent and not upon the business of his employer. Record, p. 23 (45).

Under this construction of the act plaintiff in error on the second trial amended his original declaration and raised the additional Federal questions that as construed and enforced the act (a) violated the 14th Amendment, paragraph 1 of the Constitution of the United States, and (b) violated the 10th section and 1st paragraph of Article 1 of the Constitution of the United States prohibiting laws impairing the obligations of contracts, and (c) violated the commerce clause of the Constitution of the United States, clause 3, section 8, article 1. General demurrer was interposed to the declaration as amended, and sustained, and this judgment was affirmed by the Supreme Court of Georgia. (See Record pp. 43-50.)

In the second opinion of the Supreme Court of Georgia the act is held in effect to be a tax upon the business of the employer and

that "it is unconstitutional only to the extent that it seeks to tax interstate commerce. To that extent it is invalid, and the plaintiff in error would not have been subject to the tax at all had he confined himself to interstate business."

SPECIFICATION OF ERRORS RELIED ON.

First.—The Court erred in holding that the specific tax upon all agents of packing-houses doing business in this State, levied and collected of plaintiff in error under the provisions of paragraph 19 of section 2 of the General Tax Act of Georgia, approved December 21, 1900, and the provisions of section four of said act, requiring plaintiff in error to register his name and place of business (Acts of Georgia Legislature 1900, p. 21), are not violative of paragraph 1 of article 14 of the amendments of the Constitution of the United States, known as the fourteenth amendment of said Constitution, for that the State of Georgia by and through said provisions of said act seeks

(a) To deprive plaintiff in error of his liberty and property under an arbitrary and unlawful classification, without due process of law.

(b) To abridge the privileges and immunities of plaintiff in error, as a citizen of the United States.

(c) To deny to plaintiff in error the equal protection of the laws.

Second.—The second assignment of error will not be insisted upon.

Third.—The court erred in holding that by the provisions of said paragraph and section of said act which require plaintiff in error to register and become liable to said specific tax by reason of his being agent for Nelson Morris & Company, the greater part of whose business is interstate commerce in the conduct of which the services of plaintiff in error are necessary, there is no unlawful tax upon or interference with or regulation of interstate commerce in violation of clause 3, section 8, article 1 of the Constitution of the United States, for that

(a) A tax on the privilege of selling goods is in effect a tax on the goods themselves.

(b) One who, in this State, as agent of a principal residing in another State, takes orders on such principal for the purchase of goods

held in such other State, and who, when the goods are shipped by his principal to him, receives them in this State, and delivers them in the original packages to the customers from whom he obtained the orders, and upon delivery receives from them the price of the goods, is engaged in interstate commerce.

(c) Interstate commerce can not be taxed, regulated or interfered with in any manner or to any extent by the laws of any State.

(d) A law of a State which taxes, regulates, or interferes with a business as a whole, while said business is partly interstate and partly domestic, must be so framed and enforced as to operate alone upon that part of said business which is domestic, in default of which the entire law is void as being repugnant to the Constitution of the United States providing that Congress has exclusive power to regulate commerce among the several States.

(e) Said paragraph and section of said act of the Legislature of Georgia, by their terms and necessary operation, impose a tax and a regulation upon the entire business of Nelson Morris & Company, including that part of the business of Nelson Morris & Company which is interstate commerce. This is alleged to be the greater part of said business and the demurrer admits the truth of the allegation.

Fourth.—The court erred in holding that one who is subject to a specific occupation tax by reason of his conducting, for another, a domestic business within this State, is not rendered exempt from such tax because he also conducts for the same principal other business which is not subject to State taxation, for that such a tax upon such an occupation can not be segregated, and must rest upon the sales of goods made both in domestic and interstate commerce, and hence amounts to a tax upon and regulation of the latter in violation of said provisions of the Constitution of the United States.

Fifth.—The court erred in affirming the judgment of the said city court of Atlanta sustaining said demurrer and in not reversing said judgment and sending said case back for further proceedings in accordance therewith.

ARGUMENT.

Clear discussion of this case requires at the outset a succinct exposition of the case law of Georgia on what constituted interstate commerce at the time this suit was brought and the changes therein before its final determination, with an analysis of the two opinions of the Supreme Court of Georgia in the record.

This suit was filed April 6, 1901. Record, p. 22.

In Racine Iron Co. *vs.* McCommons, 111 Ga. 536, decided August 7, 1900, the Supreme Court of Georgia announced its decision that agents of principals residing in other States who made "executory contracts for the sale of goods, and who, when the same are shipped into this State, receive them in bulk, break the original packages in which they are contained, and distribute them among the customers with whom such contracts have been made," are not engaged in interstate commerce within the meaning of the Federal Constitution. With this recent case, then before counsel, the Federal question, that the act under discussion burdened and interfered with interstate commerce, was not then raised by the pleadings. The case at bar was originally brought and tried below, as appears in the record, on the grounds that plaintiff in error was not conducting any business of his own; that the classification in the act was unreasonable and arbitrary; and that the act as applied to plaintiff in error violated the fourteenth amendment. These questions were decided adversely to plaintiff in error in the first opinion of the Supreme Court of Georgia, handed down April 3, 1902, and found in the record, page 23. In this opinion the act under discussion is construed to declare "that an agent representing a packing-house and carrying on its business in any county in this State is pursuing a vocation or occupation, and is *himself* doing business in this State, and is liable to the tax." Further construing the act the Supreme Court of Georgia says that "the word 'agents,' as used in this paragraph of the act, means managing or superintending agents, and

includes every agent who is the *alter ego* of the principal by whom he is employed." Record, page 23; 1st and 2d headnotes.

The foundation of this decision rests on the proposition that the agent is *himself* conducting a business of his own, *individually* and *personally*, separate and apart from the business of his employer.

Following the trend of the decisions of this Honorable Court, when Stockard *vs.* Morgan, 185 U. S. 27, was decided April 7, 1902, it foreshadowed the coming of Caldwell *vs.* North Carolina, 187 U. S. 622, with sufficient clearness to justify counsel in raising the interstate commerce question as plead in the amendment filed June 21, 1902, and found in the record, pp. 37-42. The question thus raised is decided in the second opinion in the record, (pages 43 to 50), which was delivered on May 30, 1903. In the meantime Caldwell *vs.* North Carolina, 187 U. S., 622, was decided Jan. 12, 1903, resulting in a reversal by the Supreme Court of Georgia of its former decisions on the line of Racine Iron Co. *vs.* McCommons (111 Ga. 536), and the announcement of the law, in conformity with the decision of this Honorable Court, as reported in Stone *vs.* State, 117 Ga. 292, decided March 13, 1903.

In the *Stone* case the Court says: "One who, in this state, as representative of a principal residing in another State, takes orders on such principal for the purchase of goods held in such other state, and who, when the goods are shipped by his principal to him, receives them in this state, breaks the original packages in which they are contained, distributes them among the customers from whom he obtained such orders and upon delivery receives from them the price of the goods, is engaged in interstate commerce."

The doctrine of the *Stone* case is given full effect in the second opinion in the case at bar, the foregoing quotation therefrom being embodied in the opinion in the record, page 47, followed by this language: "Under these rulings, by which we are bound, that part of Nelson Morris & Company's business which consisted in shipping goods to Atlanta to fill orders previously received, the goods being

delivered in accordance with such orders, was interstate commerce. It was, therefore, not subject to taxation or interference by the State, and an act seeking to impose any tax upon such a business would be unconstitutional and void. The occupation of the plaintiff in error as agent for the conduct of this part of the business is so closely and directly connected therewith that, in so far as the act seeks to tax him as such agent, the act is void." Record, page 47. In the same division of the opinion it is held that "a tax or charge for a license to sell goods is, in effect, a tax on the goods themselves."

It is important to observe and keep clearly in mind, that the learned Court in its second opinion expressly reaffirms its judgment in the first opinion and holds the same to be *res judicatæ* of all questions therein raised and decided. See Record, p. 45. The first decision construes the act; the second applies it. It is respectfully insisted that the application of the act as thus construed is erroneous, in that it was not declared wholly void, instead of partially void. This error, we submit, resulted from the Court, in its second opinion, failing to keep in mind the meaning and purpose of the act as defined in its first opinion. As construed in the first opinion, it was the purpose of the act "to tax only one agent in each county, representing or conducting the business of a packing-house, and as only one, the managing or head agent, (was) in charge of the business, (he) was the one intended." Record, p. 27 (63).

It is further held that this managing-agent, or *alter ego,* was so classified and subjected to the tax because, through him, the "packing-house conducts its entire business in a given locality," and "to hold otherwise would be to attribute to the General Assembly (of Georgia) the utterly unreasonable purpose of imposing a specific tax of two hundred dollars upon every employee of a packing-house doing business in Georgia, without regard to the extent of his authority or the amount of his compensation." Record, p. 27 (53).

Reading into the act the meaning thus given it, it imposes a tax

"Upon all managing or head agents of packing-houses in charge of the business of such packing-houses to the extent of one such agent for each packing-house in each county in the State of Georgia representing or conducting the entire business of such packing-house therein."

In applying the act in the second opinion the learned Court holds that the effect of the tax falls on the packing-house, because it is imposed on their instrumentality for the sale of goods, to wit: their *alter ego* agent; and, as to that part of their business, conceded to be interstate, the occupation of plaintiff in error, as agent, is so closely and directly connected therewith the act is void in so far as it seeks to tax him as such agent. This attempt to split the occupation of plaintiff in error, in applying the act, does not place a construction on it different from that announced in the first opinion. That construction stands. Under that construction, however, the application of the act to two kinds of business is impossible, because the first opinion expressly holds that it was the purpose of the act "to tax only one agent;" and the one agent so taxed was to be the manager or *alter ego* of the employer; he was the one intended, because he conducted for the packing-house *"its entire business;"* his classification for the purpose of such taxation was reasonable, because he did conduct the *entire* business, and to hold otherwise would be to attribute to the General Assembly of Georgia an "utterly unreasonable purpose."

From what has been said it appears that in the first opinion the act is construed to be levied upon plaintiff in error, individually and personally; and in the second opinion it is applied as though it had been imposed directly upon the business of his employer and is upheld only because a portion of such business is found to be domestic and not interstate.

Our argument will proceed on two general lines: the act violates, first, the fourteenth amendment and, second, the commerce clause of the Constitution of the United States.

I.

THE ACT VIOLATES THE FOURTEENTH AMENDMENT.

Plaintiff in error most respectfully insists that this act is obnoxious to the fourteenth amendment of the Constitution of the United States, which, under the construction of the Supreme Court of the United States, guarantees to plaintiff in error and all other citizens of the United States "the liberty of pursuit—the right to follow any of the ordinary callings of life."

Butchers' Union Co. *vs.* Crescent City Co., 111 U. S. 746.

"The 'liberty' mentioned in that amendment means not only the right of a citizen to be free from the mere physical restraint of his person, as by his incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose *to enter into all contracts* which may be proper, *necessary and essential* to his carrying out to a successful conclusion the purposes above mentioned."

Allegeyer *vs.* Louisiana, 165 U. S. 578.

(a) The decision says: "It does seem somewhat anomalous to speak of the business of one, who, as agent, is really not conducting business of his own, but the business of some one else, but it was within the power of the Legislature to declare that one doing this very thing was himself carrying on business, and we think that is exactly what the General Assembly has done in this instance." Record, p. 25. In conforming to the provisions of the act as applied to this "anomalous" business one who proposed to engage in it, *before* he would be authorized to pursue it, must go before the ordinary of the county in which he proposes to do the business, register his name, his place of business, and *at the same time* pay his tax. Bear in mind that his business is to be that "of one who, as agent, *is really not conducting business of his own*, but the business of some one

else," and it necessarily follows that "some one else" will have to be consulted and propitiated before he will allow the "subject of this tax" to conduct said business; that is to say, the person out of employment must be employed before he has a business, and yet he must register before he can do business, lawfully, even the anomalous business indicated; and pay $200 tax for the privilege of pursuing a "vocation or occupation" at a specified place in a specified county.

The anomalous business, which under this decision the Legislature has classified for taxation, can not be engaged in without the procurement of the employment designated as a business. This employment involves a contract between employer and employee,—in the case at bar, weekly employment, subject to discharge without notice. A "business" of even this weak and brief a tenure can not be lawfully engaged in, which is to say such a contract of employment can not be lawfully complied with until the proposed employee has first registered and paid his tax. None of the other employees at this "place of business" are so hampered; they are free to live and work where they will; to earn their livelihood and contract for that purpose *ad libitum* so long as they avoid the appellation of "Chief Clerk and Manager."

(b) The singling out of the chief clerk and manager from among all the employees of Nelson Morris & Company in the city of Atlanta, Ga., and arbitrarily creating a separate and distinct class of chief clerks and managers of packing-houses doing business in this State, and declaring that such clerks and managers are pursuing a vocation and occupation and are themselves doing business in this State, and requiring the payment of a tax and the registration of such business as a condition precedent to the privilege of carrying it on, is a mere juggling with words by the Legislature, and does not in any manner change the real nature of the business of such men or their true relation to their principals or employers. The levying of this tax and the requirement as to this registration in

respect of the chief clerk and manager (who, according to the allegations of the declaration is no more nor no less than an employee of Nelson Morris & Company, as are the other clerks and employees of said firm), has the necessary effect of putting burdens upon the chief clerk which are not imposed upon others in like situation, and thereby deprives him of the equal protection of the law and of his property and his liberty without due process of law in violation of the fourteenth amendment of the Federal Constitution.

The declaration alleges in paragraph six that at this Atlanta house there are eleven other employees; that is, your petitioner, the bookkeeper, the assistant bookkeeper, the stenographer (who also acts as a billing clerk), the shipping clerk, two city salesmen, the man in charge of the cooler where meats are preserved until sold (called the cooler man), two drivers, and a laborer, who boxes, wraps or crates goods sold for shipment. The wages and salaries of each of the above-stated employees are paid by the week, and each and all of said employees, including your petitioner, are employed by Nelson Morris & Company, the exclusive owners of said business.

The demurrer admits the truth of this allegation. This act singles out plaintiff in error, arbitrarily assumes that he is the *alter ego* of his employers, thrusts upon him an occupation and a business consisting of drawing his weekly salary in consideration of devoting his time to his employers' business, compels him to register or become a criminal, imposes a heavy and unreasonable tax of $200 a year, or fraction thereof, for the so-called privilege of working for his wages, and imposes no such restraints, nor any restraints of any kind, upon his coemployees in the same business, at the same place, under the same circumstances, and with the same interest or lack of interest in the firm by which they are in common employed.

This plaintiff in error lived and worked as the employee and chief clerk and manager of Nelson Morris & Company without let or hindrance prior to the passage of this act. He was earning his liveli-

hood by this lawful employment, and for that purpose he had entered into a contract for a weekly stipend with Nelson Morris & Company, in consideration of which he devoted his time and energies to their business. Every other clerk and employee there was doing exactly the same thing. Since this act the chief clerk and manager is deprived of these rights and privileges unless he pays this extraordinary and unreasonable tax, and subjects himself to criminal prosecution in default of payment and registration, as required by this act, and yet the other employees are permitted to go on in the same way as before without any burdens or restrictions whatever. We most respectfully submit that this is a denial to the plaintiff in error of the equal protection of the laws, as guaranteed to him by the fourteenth amendment of the Federal Constitution.

(c) But take a broader view of the situation. Packing-houses are not the only institutions that require chief clerks and managers, or other employees, on weekly wages, or who are required to conduct their business through an agent which may be termed the *alter ego* of his principal. It is impossible to say that the general manager of a packing-house employed on a weekly salary, from a *personal* and *individual* standpoint, is conducting *personally* and *individually* a business different from that of the general manager of any other kind of an establishment who is employed on a weekly salary. The business of the employers may and does vary as widely as the different channels of trade and commerce are divergent. The *personal* and *individual* business of these general managers remains the same. The fact that one manages a packing-house, another a shoe-house, another a dry-goods house, another a publishing-house, is a mere incident to their common type of business, viz.: managers or *alter egos* of their respective principals, each employed on weekly salaries and each discharging his particular duties to his particular employer. To illustrate, suppose the act had specified traveling salesmen of packing-houses instead of managing agents. Can it be said that the traveling salesmen of a packing-house on a weekly salary basis,

considered *personally* and *individually,* is engaged in a business different from that of a traveling salesman employed on like terms for any other kind of an establishment? They are each and all traveling salesmen employed on like terms, and each and all, *personally* and *individually,* engaged in the same business. Take day laborers, for instance; they are employed, more or less, in many different kinds of industry. The only business of any one of them is to do his day's work, at the place and in the manner required, and draw his pay. One may sow and one may reap, for

"Men must work and women must weep."

This Act arbitrarily and unreasonably selects this class of persons who are employed by packing-houses under these particular names, and places these burdens upon them, while citizens of the United States, holding similar positions, with equally high sounding titles, are permitted to pursue their like lawful callings, as guaranteed to them by the Constitution of the United States, without let or hindrance.

(d) The act is construed to impose a tax on the occupation of agents of packing-houses whether the business they have in charge is wholly interstate or wholly domestic.

"It is unconstitutional only to the *extent* that it *seeks* to tax interstate commerce. To that extent it is invalid." Record, p. 49.

Our Court has by its construction of the act held that it was the intention of the Legislature to pass an act that would levy a license or occupation tax for the same amount on any agent, the *alter ego* of the principal, who was carrying on the business of a packing-house, whether the business of the principal so carried on by the agent was wholly interstate or wholly domestic. If the one principal did only domestic business, the *alter ego* of that business was subject to the tax. If the other principal did only interstate business, the *alter ego* of his business would not be subject to the tax. The act is silent as to any distinction between the tax on the agent of the principal doing a domestic business and the agent of the

principal doing interstate business. The Supreme Court holds the act covers both. The Legislature never undertook to classify agents for the conduct of domestic business as a separate class from agents for the conduct of interstate business. Each would be an agent of a packing-house. Each would be in the same class. Each would have the same occupation, viz.: that of being agent for a packing-house. One must pay the tax—the other must not.

Thus analyzing the construction of the act by the Supreme Court of Georgia, it is plainly violative of the fourteenth amendment.

This fourteenth amendment to the Constitution has been considered in several decisions of the Supreme Court. In the case of *ex parte* Virginia, 100 U. S. 339, that court said of that amendment:

"It suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others."

Again, in considering it, the Supreme Court, in the case of Barbier *vs.* Connally, 113 U. S. 27, 31, said:

"That no impediment shall be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

In the case of Yick Wo *vs.* Hopkins, 118 U. S. 356, the Supreme Court, affirming the rule expressed in the foregoing decisions, said:

"The fourteenth amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race or color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws."

In Gulf, etc., Ry. *vs.* Ellis, 165 U. S. 151, 168, it is held that the fourteenth amendment prohibits a statutory classification which is

based on arbitrary selection. On page 159, Mr. Justice Brewer says:

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughful consideration than these words of Mr. Justice Matthews, speaking for this court, in Yick Wo *vs.* Hopkins, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all the cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

The doctrine of this case now sought to be applied is in no manner modified, but fully reaffirmed, in Railroad *vs.* Matthews, 174 U. S. 96, notwithstanding a Kansas statute imposing attorneys fees was there upheld, while the Texas statute imposing attorneys' fees was, in the Ellis case, declared unconstitutional. The Kansas statute was upheld because it involved a police regulation, while the Texas statute merely imposes a penalty. There is no pretense that the act

in the case at bar is anything more than a revenue law. Its caption so declares it, and the Court below so treats is. (See Linton *vs.* Childs, 105 Ga. 567, 573, and citations.) See also:

In re Yot Sang, 75 Fed. Rep. 984.
Fraser *vs.* McConway, 82 Fed. Rep. 257, 259.
Randolph *vs.* Builders & Painters Supply Co. 106 Ala. 501.
New York Life Insurance Co. *vs.* Smith (Texas), 41 S. W. Rep. 680.
St. Louis, etc., Ry. *vs.* Williams, 49 Arkansas, 492.
Denver, etc., Ry. *vs.* Outcalt, 2 Colo. App. 395.
Atchison, etc., Ry. *vs.* Baty, 6 Nebraska, 37.
O'Connell *vs.* Lumber Co. (Mich.), 71 N. W. Rep. 449.
Jacksonville *vs.* Carpenter, 77 Wisconsin, 288.
State *vs.* Dering, 94 Wisconsin, 588.
Pearson *vs.* Portland, 69 Maine, 278.
Burrows *vs.* Brooks (Mich.), 71 N. W. Rep. 460.
Middleton *vs.* Middleton, 54 N. J. Eq. 692.
State *vs.* Goodwill, 33 W. Va. 179.
Kuhn *vs.* Common Council, 70 Michigan, 538.
State *vs.* Hinman, 65 N. H. 105.
State *vs.* Penwyer, 65 N. H. 116.

II.

THE ACT IS A BURDEN UPON AND A REGULATION OF INTERSTATE COMMERCE.

This brief need not be extended by citing authorities to the proposition that a tax on the privilege of doing a business is in effect a tax on the business itself, for this is admitted in the decision under review. Record, p. 46 (91).

Nor is it necessary to cite authorities to the proposition that when the managing agent took orders in Georgia to be filled in Chicago and afterwards received the goods and broke the bulk of the car and distributed the goods to the customers from whom he obtained such orders and collected the purchase price, all in Georgia, he was engaged in interstate commerce. This proposition is admitted by the learned Chief Justice below, following Caldwell *vs.* North Carolina, 187 U. S. 622. See Record, p. 47 (92).

The declaration as amended shows that the business, upon which this tax, in effect, is a burden, is for the most part interstate business. That portion of it which may be termed intrastate or domestic business is incidental to the main object in view. It is shown to be necessary to transport and keep fresh meats in cold storage. "In most cases said goods are sold at or before the day of their shipment and, when received in Atlanta, delivered in the original packages to the purchasers of said goods.' Record, p. 8 (15). The demurrer admits the truth of this allegation and the Supreme Court of Georgia expressly holds that such dealing constitutes interstate commerce. Record, p. 44 (3d headnote).

The only additional business done is to preserve in coolers and dispose of in regular course of business "the rest of said goods so shipped to Atlanta."

Plaintiff in error is the managing agent for the entire business of Nelson Morris & Company at Atlanta, and under this act, as con-

strued, is the instrumentality through which Nelson Morris & Company's business is affected. There is but one business, one managing agent, and one tax. Nothing written or read into the act draws any distinction between that part of the business which is interstate and that which is domestic. The act makes no reference at all to the business of the packing-house, except as descriptive of the class of persons taxed. Nothing in the record justifies the learned Chief Justice in saying that "petitioner, as managing agent, is conducting two kinds of business."

The general rule laid down by this Court under which tax acts are held void, as burdens upon or regulations of interstate commerce, are so familiar that extended citations are deemed unnecessary.

In *Crutcher vs. Kentucky*, 141 U. S., 47, the act declared unconstitutional provided "that it shall not be lawful, after the 1st day of May, 1860, for any agent of any express company, not incorporated by the laws of this commonwealth (Ky.), to set up, establish or carry on the business of transportation in this State, without first obtaining a license from the Auditor of Public Accounts to carry on such business." This was not primarily a revenue act, because it required certain financial strength to be shown as a condition to grant of license; and the chief argument in its support rested on the contention that it was the legitimate exercise of the police power of the State. The act was held to be invalid because it prohibited the agent from carrying on the business of his principal, without first obtaining a license, and this was a regulation of interstate commerce, inasmuch as the "largest portion" of the business of the company he represented was interstate commerce. In the opinion Mr. Justice Bradley says: "As a summation of the whole matter it was aptly said by the present Chief Justice in Lyng *vs.* Michigan, 135 U. S., 161, 166: 'We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects

f that commerce, or on the receipts derived from that transporta-ion, *or on the occupation or business of carrying it on,* for the rea-on that taxation is a burden on that commerce, and amounts to a egulation of it, which belongs solely to Congress.'

"We do not think that the difficulty is at all obviated by the fact hat the express company, as incidental to its main business (which s to carry goods between different States), does also some local usiness by carrying goods from one point to another in the State f Kentucky. This is, probably, quite as much for the accommoda-ion of the people of that State as for the advantage of the company. But whether so or not, it does not obviate the objection that the egulations as to license and capital stock are imposed as conditions n the company's carrying on the business of interstate commerce, vhich was manifestly the principal object of its organization. These egulations are clearly a burden and a restriction upon that com-nerce. But whether intended as such or not they operate as such."

In *Osborn vs. Florida,* 164 U. S., 650, the act under considera-on imposed the special tax *directly upon the express company* and nflicted the penalties for failure to procure licenses not only upon ne company itself, but upon any person knowingly acting as its gent before *it* paid the tax. The Supreme Court of Florida con-trued the act to apply only to the local business of the company one within the State of Florida, saying that there was nothing in ne act that "should or can properly be construed to apply to inter-tate or foreign commerce." With this language before him, Mr. ustice Peckham says:

"The Supreme Court of Florida has construed the ninth section f this act and has held in express terms that it does not *apply* to or *ffect* in any manner the business of this company, which is inter-tate in its character; that it *applies* to and affects only its business vhich is done within the State, or is, as it is termed, 'local' in its haracter, and it has held that under that statute so long as the ex-ress company confines its operations to express business that con-

sists of interstate or foreign commerce, it is wholly exempt from the legislation in question."

This construction not being open to review by the Supreme Court of the United States, it followed as a matter of course that the act was held not to violate the commerce clause of the Federal Constitution. But for this construction by the State Court, the result would have been different.

"It may be here assumed that if the *statute* applied to the express company in relation to its interstate business, it would be void as an attempted interference with or regulation of interstate commerce." Idem, pp. 653, 654.

The case at bar falls within the doctrine of the *Crutcher* case and is distinguished from the *Osborn* case because

(a) The act as construed by the Supreme Court of Georgia, applies to the agent and solely to the managing agent or *alter ego* of the principal, and not directly to the principal. The entire business of the employer is in effect taxed through the single medium of such manager.

(b) By the terms of the act this particular agent is required to register or take out a license and pay the tax *before* he can do any business for his principal, either domestic or interstate.

(c) His duties for the most part, related to the conduct of the interstate business of his principal.

(d) The Florida Court in the *Osborn* case did not hold that the act then under review was unconstitutional to the extent that it affected interstate commerce. On the contrary that act was declared to be wholly constitutional because it did not, and was not intended to, apply to or affect in any manner interstate commerce. "The act involved in the present case imposes a tax on the agents of packing-houses which do business in the State. It is unconstitutional only to the extent that it seeks to tax interstate commerce. To that extent it is invalid." (Quotation from second opinion. Record, p. 49 (96).)

It thus appears that the statute herein falls within "the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the State whatever unless upon the payment of the fee or tax. It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void." *Osborn* case, supra, page 655.

It is certain that Nelson Morris & Company, residents of Chicago, can not conduct their business in Georgia, most of which is admitted to be interstate business, without the instrumentality of a managing agent, or *"alter ego;"* upon this instrumentality the tax is imposed; if lawful it may easily be made prohibitory.

In *Pullman Palace Car Company vs. Pennsylvania*, 141 U. S. 18, a distinction is very clearly drawn between those cases upholding a tax as not regulating interstate commerce, where it is imposed merely on the property employed in the business, from the cases where the tax is laid upon the right to do business at all. In the latter class of cases such taxes are held to impose a direct burden on the commerce itself, and of course the regulations as to procurement of license, etc., amount to regulations of such commerce. In the majority opinion the court say:

"Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State can not be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. Moran *vs.* New Orleans, 112 U. S. 69, 74; Pickard *vs.* Pullman's Southern Car Co., 117 U. S. 34, 43; Robbins *vs.* Shelby Taxing District, 120 U. S. 489, 497; Leloup *vs.* Mobile,

127 U. S. 640, 644. For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one State and other States or foreign nations has been held to be invalid. Fargo *vs.* Michigan, 121 U. S. 230; Philadelphia & Southern Steamship Co. *vs.* Pennsylvania, 122 U. S. 326.

"The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the State, is, in substance and effect, a tax on that property; Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S. 196, 209; Western Union Telegraph Company *vs.* Attorney-General of Massachusetts, 125 U. S. 530, 552. This is not only admitted, but insisted on, by the plaintiff in error."

In *Pullman Company* vs. *Adams,* 189 U. S. 420, *Crutcher* vs. *Kentucky* is distinguished and *Osborn* vs. *Florida* is followed in upholding an Act of Mississippi levying a privilege tax on sleeping-car companies:

"On each sleeping and palace car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad track over which the company runs its cars." We assume that the last words mean what afterwards was expressed by an amendment, "over which the company runs its cars in this State."

In deciding the case Mr. Justice Holmes says:

"The Pullman Company is an Illinois corporation. Its sleeping-cars were carried by various railroad companies, and all of them were carried into the State from another State, or out of the State to another State, or both. But such cars in their passage also carried passengers from point to point within the State, and a specific

fare was collected by the servants of the Pullman Company. The company attempted by pleas and by an offer of evidence to bring before the Court the fact that its receipts from this class of passengers did not equal the expenses chargeable against such receipts. It contended that these facts would show that the business within the State was merely a burden on its commerce between the States, while at the same time, it argued, it was compelled to assume that burden by Sec. 195 of the State Constitution, which declares sleeping-car companies to be common carriers and subject to liability as such. The pleas were held bad on demurrer, the evidence was rejected, and the jury was instructed to find for the plaintiff on the facts admitted. These rulings and the refusal of the court to declare the above-mentioned section 3387 unconstitutional are the errors assigned.

"If the clause of the State Constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the State Constitution and the statute combined would impose a burden on commerce between the States analogous to that which was held bad in Crutcher *vs.* Kentucky, 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by Osborn *vs.* Florida, 164 U. S. 650. The company can not complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax.

"As the validity of the tax is thus bound up with the effect of the section of the State Constitution, we think that the Pullman Company was entitled to know how it stood under the latter, and that a judgment against it could not be justified by reasoning which leaves that point obscure. We are somewhat embarrassed in dealing

with the case, because we are not quite certain whether we rightly interpret the intimations upon the subject in the judgment under review. If the Constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the Constitution or the tax act, is invalid. But we assume that the opinion of the supreme Court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the Constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, and we take it so the more readily that we can see no ground for a different view. If we are right in our understanding the judgment of the Supreme Court was correct for the reason sufficiently stated above."

Now it is very clear that if the Pullman Company had been required to take all passengers offering themselves for transportation between points wholly within the boundaries of Mississippi; if its choice as to the kind of business it would transact in that State was removed by the mandatory requirements of the State Constitution; and if it established its contention that its business within the State was merely a burden on its commerce between the States,—certainly the privilege tax act above quoted would have been declared invalid.

We respectfully submit that nothing in this case militates against our contentions in the case at bar. If the tax under discussion was levied directly upon all packing-houses doing business in Georgia, and all such packing-houses were required to take out licenses, the question would be very different. Such a law would be so distasteful to Georgia packing-houses that it would probably never be passed by the Legislature. Instead of levying the tax on all packing-houses doing business in Georgia, the act is so framed that it affects only those packing-houses who are under the necessity of doing their business in Georgia through an *"alter ego"* or managing agent, and through such medium the whole of their business

in this State is affected by requiring this managing agent to register and pay the tax. The effect on the whole of such business is not mollified by holding that the act is void in so far as it seeks to tax interstate commerce, as will be hereafter more fully discussed.

Allen vs. *Pullman Company*, 191 U. S. 172, 183, is the latest case pertinent to the case at bar.

In this case two kinds of legislation were under consideration, viz.: First—An act applying to all the business sought to be taxed, and under its terms requiring payment for the privilege of conducting such business (the running of Pullman cars) regardless of the fact whether it was interstate or domestic. Second—A series of tax acts the terms of which apply strictly to business done wholly within the State.

The first Act is held to regulate interstate commerce and to be therefore void, and the latter acts are held to be constitutional, it not appearing that compliance with their terms was compulsory before any business of any character could be done within the State.

The first act above referred to levied a privilege tax upon the running of sleeping-cars, requiring each company doing business in the State of Tennessee to pay $500. per annum on each car, for the privilege of operation whether it made a business of it or not. This court held the Act of 1887 to be void under the ruling in Pickard *vs.* Pullman Company, 117 U. S. 34, because it was substantially the same as the Act of 1877 which was declared to be void in the Pickard case. Mr. Justice Day uses the following language:

"Under the earlier act the tax is required for the privilege of running and using sleeping-cars on railroads, not owning the cars. In the latter act it is exacted for the privilege of doing business in the State. This business consists of running sleeping cars upon railroads not owning the cars and is precisely the privilege to be paid for under the first act, neither more nor less. In neither act is any distinction attempted between local or through cars or carriers of passengers. The railroads upon which the cars are run are

lines traversing the State, but not confined to its limits. The cars of the Pullman Company run into and beyond the State as well as between points within the State. The act in its terms applies to cars running through the State as well as those whose operation is wholly intrastate. It applies to all alike, and requires payment for the privilege of running the cars of the company regardless of the fact whether used in interstate traffic or in that which is wholly within the borders of the State."

The opinion goes on to say that:

"There is no decision of the Supreme Court of Tennessee limiting the act in its operation to intrastate traffic. It is true that the Comptroller has sought to restrain the operation of the law by imposing the tax for two years upon cars running between Nashville and Memphis and between Nashville and Chattanooga for two years, and fixing one car in each year as the proportion of local business done on interstate cars for two years. But this action does not conclude the State in taxing for other years, and the action taken by the Comptroller does not limit the terms of the law affecting interstate commerce."

So in the case at bar there is no decision of the Supreme Court limiting the Georgia act in its operation to intrastate business. On the contrary, the decisions under review hold that the act operates so as to affect both the domestic and interstate business of Nelson Morris & Company, and to the extent that interstate business is affected the act is declared to be void. But the act does not operate directly on the business of Nelson Morris & Company. Their business is affected solely through the medium of their general manager. The effect thus produced is single and not divisible, because the medium through which it operates is single and not divisible. The effect of hydrogen is to stifle combustion, while oxygen excites it. It would be as easy to divide a stream of water played on a fire so as to eliminate the effect of the oxygen and confine it to the hydrogen it contains, as to divide the act under review so as to

annul that part of it which affects interstate commerce, and confine it to the domestic business upon which it bears. As the elements of the water form the single stream which, through the hose pipe, extinguishes the fire, so the elements of the act form the single law which, through the agent, affects the business of his employer. The chemist can reduce the water to its elements and then eliminate one of them, but he can not annul the effect of one of them while still in combination with the other.

So the Supreme Court of a state, by a sort of intellectual alchemy, can analyze an act of the Legislature and so construe it as to eliminate from it the appearance of an obnoxious element.

By a sort of legal fiction (a process unknown to chemistry), the hydrogen is found never to have been an element in the compound at all, however strong the odor of it may be, and the Supreme Court of the United States must treat the subject accordingly, despite the evidence of its own olfactories. In other words, if a legislative act was the equivalent of water, the Supreme Court of the State in which it was enacted could declare that it was not water at all, but pure oxygen or pure hydrogen, as the case may be. And the Supreme Court of the United States could not take issue on the subject, but would have to declare that the effect of the act was solely that of oxygen or hydrogen, as the case may be. But if the State Supreme Court concedes that the act was water, and undertakes to annul one of the elements of the fluid, while yet in combination, by declaring that with both elements in it, it shall, in application, have the effect of but one, this Court would not be bound by such a judgment.

Under the inflexible law of chemistry oxygen and hydrogen combine to form water. The effect of water on fire, under another inflexible law, is uniform, while the effects produced by its constituent elements on the same fire, when applied separately, are diametrically opposite. If, however, but one conduit is available, the elements passing through it, in combination, can have but the one ef-

fect, viz.: to extinguish the fire. The obnoxious hydrogen in the present act which has the effect to regulate, and mayhap extinguish, interstate commerce can not be avoided in passing through the single available medium of managing agent in combination with the revenue producing oxygen of a tax on the privilege of carrying on a domestic business, and thus have its effect annulled. The inexorable effect of the two elements thus applied, if sufficient quantity is used, will be to put out the fire—stifle the business—altogether, both state and interstate.

We assume, therefore, that when this learned court in the *Allen* case, supra, comments on the absence of a decision of the Supreme Court of Tennessee limiting the Act of 1887 "*in its operation* to intrastate business," it meant that there was no decision so construing the act as to limit it, in its operation, to intrastate business. This court has always held that, regardless of the phraseology of a law of a state, if its necessary effect and operation is to violate the Federal Constitution it will be declared void.

The act under discussion by its terms requires compliance with its regulations, and payment of the tax it imposes, for a full fiscal year as a condition precedent to exercising the privilege of the occupation described. The occupation described is construed to be that of managing, or "*alter ego*" agent of a packing-house, regardless of whether such packing-house is within or without the State, or whether its business is interstate or local.

It was the purpose of the act to tax only one such agent. There could not be two agents, one in charge of the domestic and the other in charge of the interstate business, because neither would then be "the managing or head agent in charge of the entire business." Neither would be an *alter ego* in charge of *the* business, treating it as a whole.

Hence under the purpose of the act to tax only one agent, and that the managing or head agent, in charge of the entire business, if any of the business was interstate business that part of the busi-

ness is taxed as surely as any other part of the business is taxed; if all of the business is thus regulated by requiring this particular agent to register, etc., that part of it which is interstate is as certainly regulated by the act as that the whole includes all of its parts.

Therefore, the Act under review falls within the doctrine of the *Allen* case and *Crutcher* case holding the several acts, therein considered, to be void as unconstitutional regulations of interstate commerce.

Leloup vs. *Mobile*, 127 U. S. 640, 647, is cited as an authority to support the *Allen* case. Its doctrine is clearly to the effect that where a tax affects the whole business without discrimination, it is void, notwithstanding a portion of the business affected is domestic. It is most respectfully insisted that the learned Chief Justice of Georgia misconceived the import of the decision in the Leloup case. In the fifth division of the opinion (Record, pp. 48 and 49), it is argued that the Leloup case is inapplicable because it involves the rights of a telegraph company under the Act of Congress of 1866. In deciding the *Allen* case, Mr. Justice Day quotes from the opinion of Mr. Justice Bradley in the *Leloup* case as follows:

"But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subject to taxation, without the imposition of a tax which covers the entire operations of the company."

This quotation demonstrates that the Act of 1866 did not in any manner influence the decision. The true doctrine of the Leloup case has been reaffirmed consistently by this court down to the Allen case in the 191st.

See Asher *vs.* Texas, 128 U. S. 129.

Western Union Tel. Co. *vs.* Alabama, 132 U. S. 477.

Lyng *vs.* Michigan, 135 U. S. 166.
McCall *vs.* California, 136 U. S. 110.
Crutcher *vs.* Kentucky, 141 U. S. 58.
Pollock *vs.* Farmers' Trust Co., 157 U. S. 582.
Adams Express Co. *vs.* Ohio, 165 U. S. 234.
Stockard *vs.* Morgan, 185 U. S. 34.
Atlantic Company *vs.* Philadelphia, 190 U. S. 162.
Allen *vs.* Pullman Co., 191 U. S. 179.

The *Leloup* case is in no manner modified, and the opinion under review is to no extent supported, by Postal Telegraph Cable Co. *vs.* Charleston, 153 U. S. 692.

The distinction lies in the language of the legislation attacked. The ordinance there complained of, by its express terms, limited its operation to "business done exclusively within the city of Charleston."

So in *Western Union Telegraph Company vs. Alabama,* 132 U. S. 472, the tax contested was imposed, by the express letter of the law, exclusively upon the business done by the company in the State of Alabama.

Ratterman vs. *Western Union Telegraph Company,* 127 U. S. 411, was decided on the same date as the *Leloup* case. Both decisions were unanimous. It is hardly to be supposed there was any conflict between them in the minds of this court at the time they were decided. There is no conflict between them in fact or in principle. The Ratterman case appears to have been really a *moot* case. The question certified by the circuit judges, on difference of opinion, was robbed of its pith and point by the agreed facts. The whole extent of the decision is that inasmuch as the receipts from interstate business were separable from the domestic business, the tax complained of would not be declared wholly void, but only to the extent that it was imposed on the receipts from interstate business. It being a tax on receipts, and the source of the receipts being ascertainable (indeed, under the agreed statement of facts, already ascer-

tained), its enforcement could be easily confined within constitutional limits.

How different is the case at bar? Here the single medium through which the tax is imposed upon the business is the "*alter ego*" of the non-resident principle. Under pain of fine and imprisonment the person who proposes to occupy the position must register and pay a fixed license tax for the whole year before he can transact any business of his principal. The act itself makes no distinction whatever between interstate and domestic business. The peculiarity of the medium through which the tax is imposed would indicate an intention to tax interstate business rather than domestic. A domestic packing-house would have no need for an *alter ego*. The proprietor would be his own *ego*, if the expression is permissible. It is entirely legitimate to argue that the purpose underlying the phraseology of the act was indirectly to reach non-resident packers who necessarily did business through agents, while local houses escaped.

This is in large measure borne out by the history of similar legislation in this State seeking to tax Western packing-houses, of which this court will take judicial cognizance. The general Tax Act of the State in 1890 prescribed a license tax "upon all packing-houses doing a cold-storage business in this State, whether carried on by the owner thereof, or by their agents, $500 in each county where said business is carried on." Acts of 1890-1891, volume 1, p. 39.

In *Stewart* vs. *Atlanta Beef Company, Armour Packing Company*, and *Nelson Morris & Co.*, 93 Georgia 12, it was held that a packing-house which used cold storage for preserving its own commodities alone, and did not receive and store for the public, or any part thereof, was not doing a cold-storage business within the meaning of the act, and therefore was not subject to the tax. Thus the act for all practicable purposes was defeated. This decision was rendered October 30, 1893. Pending the decision, the Legislature re-enacted this clause *in hæc verba* in the biennial Tax Act

of 1892. See Acts of 1892, p. 26. In the light of this decision the Act passed in 1894 contained this provision:

"Nineteenth. Upon all packing-houses or dealers doing business in this State, whether carried on by the owners thereof or by their agents, fifty dollars ($50) in each county where said business is carried on." See Acts of 1894, page 22.

As this was a straight business license and applied to all alike, and the amount was reasonable, no attack on it appears in the Georgia cases. In 1896 this clause was re-enacted, except that the amount was raised to $100. See Acts 1896, p. 25. Still no attack. The amount of the tax may be presumed to have rested uncomfortably on local houses. Be that as it may, in 1898 the law was changed to read: "Upon all agents of packing-houses doing business in this State, $100 in each county where said business is carried on." See Acts of 1898, p. 25. It will be observed that this is the exact language of the act now under consideration save only that the amount is $100 instead of $200. The amount being moderate still no attack. In 1900 the act was passed making the amount $200 and was attacked in the present suit. As local houses could operate *in propria personæ* without the necessity of an *alter ego*, it may be inferred that no protest was made when the amount was doubled. If it is constitutional in form the amount can be indefinitely increased, and the local packers will monopolize the field. Could any case afford a finer illustration of the wisdom of the law which reposes power in Congress exclusively to regulate interstate commerce?

We are not unmindful of the brokers' license tax cases of which

Ficklen *vs.* Shelby County, 145 U. S. 1,

may be considered the leading case. A person doing business as a general merchandise broker has the choice of representing interstate or domestic dealers, either or both. It may well be said of such an one, in the language of Mr. Chief Justice Simmons, "if he would escape the tax, let him avoid the business which is subject to the tax and confine himself to that which is not. If he would

continue to pursue the taxed business, let him pay the tax which is imposed on all who are engaged therein. He can not engage in that business, and, by engaging also in another and non-taxable business, create an exemption for himself, and thus outstrip those of his competitors who still follow the taxed business only." Record, p. 50 (98).

Such language applied to plaintiff in error in the position the record shows him to have occupied, and engaged in the "anomalous business" attributed to him, produces mere confusion. It fails to keep in view the meaning of the act as construed by the court. If it is possible to select mere employees of persons engaged in interstate commerce and thus indirectly tax and regulate the business of the employers, the benefits of the commerce clause could be easily destroyed. Apply the doctrine to railroads, which are the most conspicuous examples of corporations engaged in both interstate and domestic commerce. By selecting the *"alter ego"* of the company in each county, and requiring him to register and pay an occupation tax in any amount the Legislature saw fit to impose as a condition to the discharge of his duties, the heaviest burdens could be placed on the interstate business of the company. If it should protest it would be informed that to escape the tax its *"alter ego"* must confine his operations exclusively to the interstate business of the company. But the company needs an *"alter ego"* for all of its business, and the law as construed reaches only the *"alter ego."* The act makes no provision for an *"alter ego"* for domestic business alone. If it were otherwise and possible, the company would have one *"alter ego"* for its domestic business and another one for its interstate business; the one subject, and the other not. The law would thus be obnoxious either to the 14th amendment or to the commerce clause. We think it is obnoxious to both, and submit, with the utmost respect, that the reasoning of the learned Chief Justice is *non sequitur* when he holds that the Act is unconstitu-

tional so far as it effects interstate business. If it is unconstitutional at all it is wholly void.

We may concede that this court is bound by the construction put upon the act in the first decision complained of, but insist that as thus construed the effect of the law renders it wholly obnoxious to the Constitution of the United States.

Respectfully submitted,

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FILED
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No. 152.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

F. E. KEHRER,

Plaintiff in Error,

vs.

A. P. STEWART,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

BRIEF FOR DEFENDANT IN ERROR.

JNO. C. HART,
Attorney for Defendant.

THE FRANKLIN PRINTING AND PUB. CO.
ATLANTA, GA.

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No. 152.

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BRIEF FOR DEFENDANT.

STATEMENT OF THE CASE.

The plaintiff in error is the "chief clerk and manager" of the packing-house of Nelson-Morris & Co. Nelson-Morris & Co. are citizens of the State of Illinois. They were carrying on in the State of Georgia, city of Atlanta, in February, 1901, a packing-house business. The plaintiff in error was at that time "chief clerk and manager." Stewart is the tax-collector of Fulton county, and as such it becomes his duty to collect the taxes due the State from citizens within the city of Atlanta. On December 21, 1900, the General Tax Act was passed, and by paragraph 19 of section 2 of this Act, a tax was levied as follows: "Upon all agents of packing-houses doing business in this State two hundred dollars in each county where said business is carried on." The tax-collector demanded of plaintiff in error the two hundred dollars tax as "agent" of a packing-house doing business in this State. The plaintiff in error paid the tax under protest and to prevent

immediate seizure of his property and to avoid criminal prosecution.

At the May term, 1901, of the city court of Atlanta the plaintiff in error filed his petition therein claiming that Stewart was guilty of a trespass against him in exacting of and requiring him to pay this money, insisting that there was no law to warrant the collection, and that the demand and collection of it was without authority of law; laying his damages in the "sum of one thousand dollars or other such large sum." The plaintiff in error attacked the constitutionality of the Act which imposed this tax of two hundred dollars upon him, because, first, it was violative of the requirement in the Constitution of the State of Georgia which provides that "all taxation shall be uniform upon the same class of subjects and *ad valorem* upon all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

It is his further insistence that the Act is violative of the Fourteenth amendment to the Constitution of the United States, in that it deprived him of the right to work for his principal "without assuming the heavy burden of said tax, which is not imposed upon other citizens of the State occupying like positions with other lawful business enterprises," and to require of him this tax, "or in default to subject his property to seizure, levy and sale, and his person to arrest and imprisonment," would be to deprive him of the rights guaranteed him by the Constitution of the United States, and of his liberty and property without due process of law, and deny to him the equal protection of the law. He further charged that the attempted classification of subjects for specific taxation as evidenced by said paragraph 19 of section 2 was unreasonable, arbitrary, unnatural and artificial and was, as applied to him, unlawful, null and void.

A demurrer to the petition was filed and after argument overruled, and Stewart, who had filed the demurrer, carried the case to the Supreme Court of Georgia, where the judgment

overruling it was reversed. The petition was then amended in the lower court, making two other questions, viz.: First, that the Act imposing the tax is *ex post facto,* and impairs the obligation of his contract; and, second, that the Act is an illegal interference with interstate commerce. Stewart renewed his demurrer and the court sustained the same. Kehrer excepted to this judgment. At the hearing of this case before the Supreme Court of Georgia at the October term, 1902, the court affirmed the judgment of the lower court, sustaining the demurrer, and it is from this last judgment the writ of error is brought.

BRIEF AND ARGUMENT.

It will be noted from the foregoing statement that this case has been twice before the Supreme Court of Georgia, and each time the question involved was whether or not the demurrer filed thereto was good. The question to be determined, therefore, taking the allegations of his petition to be true, was the plaintiff in error liable for the tax exacted of him by the tax-collector?

I.

THE TAX LEVIED WAS AN OCCUPATION TAX.

It is evident from the allegations in the plaintiff's petition that the business of which he was the agent was a "packing-house." Plaintiff in error was the "chief clerk and manager." It was his vocation and occupation. He was carrying on the vocation "of a packing-house agent." The section of the Act in question is as follows: "Upon all agents of packing-houses doing business in this State two hundred dollars in each county where said business is carried on."

II.

THE SUPREME COURT OF GEORGIA CONSTRUES THIS ACT.

In the 115 Ga. p. 186, when this case was first before the Supreme Court of Georgia, the court construed this Act of the Legislature, and the construction there given will be accepted by this court. The tax is not laid upon packing-houses, but is laid upon "agents of packing-houses. It is a "vocation" or "occupation" tax. Such agent though

he may represent a non-resident, is himself doing business in the State. The word "agent" as used in this paragraph means managing or superintending agent and includes every agent who is the *alter ego* of the principal by whom he is employed. It is apparent from section 4 of this Act that the tax is a "vocation" tax. The agent of the packing-house shall pay the tax "at the time of commencing to do business." The word "business" here manifestly refers to the business of the agent, and not that of the principal, for it is the agent and not the principal who shall pay the tax "at the time of commencing to do business."

III.

IS THE ACT IN QUESTION VIOLATIVE OF PARAGRAPH 1 OF SECTION 2 OF ARTICLE 7 OF THE CONSTITUTION OF THE STATE OF GEORGIA?

"All taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." The Supreme Court of Georgia in Kehrer *vs.* Stewart, 115 Ga. 189, has decided that this Act does not violate that provision of the State Constitution. The Court said: "The General Assembly of this State in the imposition of specific taxes upon occupations has the constitutional power to classify subjects for taxation, taxing some and omitting to tax others; and the principle of uniformity required by this paragraph of the Constitution is not violated so long as a given tax is made uniform upon all individuals belonging to the particular class upon which it is imposed. Citing Singer Mfg. Co. *vs.* Wright, 97 Ga. 114, and cases therein cited." The Legislature has the right to classify and so has classified. It has created a new class of occupa-

tions to be taxed, viz.: "agents of packing-houses," and has imposed an occupation tax upon all of that class.

The power of the General Assembly of Georgia to classify for the purpose of taxation is unquestionable.

Cooley on Taxation, p. 384.
Desty on Taxation, vol. 1, p. 96.
Williams *vs.* Fears, 110 Ga. 594.
Cutliff *vs.* Mayor of Albany, 60 Ga. 598-9.
Shepard *vs.* County Commissioners, 59 Ga. 536.
Davis & Co. *vs.* Mayor and Council of Macon, 64 Ga. p. 129.
Singer Mfg. Co. *vs.* Wright, 33 Fed. Rep. 126.
American Harrow Co. *vs.* Shaffer, 68 Fed. Rep. 750.
Mutual Reserve Fund Life Ass'n *vs.* Augusta, 109 Ga. 79.

It will be seen also from the foregoing decisions that there is nothing in the Constitution of Georgia which inhibits the taxation of certain vocations or occupations and to exempt, by failing to tax, other occupations.

IV.

IS THE ACT IN QUESTION VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

This Act does not deny to any person the "equal protection of the laws" for all persons of the class designated and described by the occupation in which they are engaged are subject to the same specific tax. The agent of the domestic packing-house is liable to the tax as is the agent of the foreign packing-house. The object of the fourteenth amendment to the

Federal Constitution was to preclude the several States from discriminating against citizens of other States.

Cooley on Taxation, p. 99.
Desty on Taxation, vol. 1, p. 223.
Slaughter House Case, 16 Wallace 36.

The specific tax levied upon persons engaged in the conduct of a particular business is in no sense obnoxious to the fourteenth amendment.

Williams *vs.* Fears, 110 Ga. 584.

The Constitution imposes no restriction on the States in the levy of taxes other than that there shall be no discrimination against citizens of other States.

Davidson *vs.* New Orleans, 96 U. S. 105.
Giozza *vs.* Tiernan, Sheriff of Galveston, 148 U. S. 657.
Hager *vs.* Reclamation District 108, 111 U. S. 709.

The contention of the plaintiff in error that the effect of the Act in question would be to deprive him of his liberty and property without due process of law is answered by an unbroken line of authorities to the effect that due process of law within the meaning of the fourteenth amendment is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government.

Giozza *vs.* Tiernan, Sheriff of Galveston, 148 U. S. 657.

The Act under consideration bears equally upon all citizens of the State of Georgia or residents therein who desire to follow the calling of "agents of packing-houses." It applies to both the agent of the local packing-house as well as to the agent of the foreign packing-house who desires to carry on a domestic business. The Act creates for taxation a class, viz.: "agents of packing-houses." Unquestionably the intent

of the General Assembly was to impose a tax on the occupation or vocation of "agents of packing-houses."

V.

IS THE ACTION IN QUESTION OFFENSIVE TO ARTICLE 1, SECTION 10, PARAGRAPH 1 OF THE FEDERAL CONSTITUTION?

This provision inhibits any State from passing an *ex post facto* law or law impairing a contract. It is the insistence of plaintiff in error that he had a contract with Nelson-Morris & Co., under which he was to be paid a stipulated sum per week for services as chief clerk and manager of their house in Atlanta, Georgia. This contract was entered into some five months before the passage of the Act. Under these facts the statute is clearly not retroactive as applied to petitioner. It does not relate to any acts done prior to its passage, but only to the designated occupation after the commencement of the year following its passage. Nor is the petitioner's contract violated. It appears that his contract is not for any definite time. He was apparently under no obligation to continue the services after the imposition of the tax on his occupation. The statute would not be objectionable as impairing the obligation of his contract, for the contract was entered into with the knowledge that the State has the right to impose taxes upon "occupations." Were this not true private persons would enter into contracts for indefinite periods, thereby depriving the Legislature and the State of the right to raise revenue by taxing such "occupations."

VI.

IS THE STATUTE AN ILLEGAL INTERFERENCE WITH INTERSTATE COMMERCE?

It will be noted that the Act as construed by the Supreme Court of Georgia does not impose a tax upon the goods shipped from the State of Illinois to the State of Georgia, or for carrying on the business of distributing the goods so shipped in pursuance of orders previously received, but the particular business subject to be taxed is the carrying on of that part of the business which is purely of a domestic character. The plaintiff in error was engaged in doing both. The shipping of dressed meats into this State in pursuance of orders heretofore received from citizens of the State of Georgia, would be interstate commerce, and a tax upon that business or upon the agent who distributed the goods so ordered would be unconstitutional, as an illegal interference with interstate commerce, and would fall within the case of Caldwell *vs.* N. C., 187 U. S. 622. The particular tax levied in this case is on the agent of the packing-house who undertakes and does sell certain dressed products not previously sold, and which are kept in storage awaiting customers. It is the domestic portion of his business that is taxed. Under the first statement of fact the plaintiff in error as the managing agent was protected from State taxation for the reason the business was interstate commerce; but when he undertook also to carry on a domestic business the latter business became subject to State taxation. The Supreme Court of Georgia recognizes that it is not within the power of the State to levy and collect a tax out of one who as the representative of a principal residing in another State takes orders and receives the goods in this State and distributes them among the customers from whom he obtains such orders. Such business would be interstate commerce and neither the agent nor goods would be liable to the

tax. See Stone *vs.* The State, 117 Ga. 292. The tax here levied and collected is because the plaintiff in error is engaged in a domestic business in that the goods he offers for sale (though shipped from outside of the State and into the State of Georgia) were here stored and offered for sale in open market, thereby becoming in character a domestic business. "The Constitution of the United States protects such goods only to the extent of preventing State legislation which imposes on them, because of their origin, burdens which are not imposed upon goods the product of such States imposing such burdens."

Kehrer *vs.* Stewart, 117 Ga. 969.

VII.

PLAINTIFF IN ERROR WAS ENGAGED IN BOTH A DOMESTIC AND INTERSTATE COMMERCE BUSINESS.

The Supreme Court of Georgia held that he was liable as an "agent of a packing-house" doing business in this State relative to the domestic feature of the business. It was expressly ruled no tax could be imposed upon him for doing the interstate business. This differentiation is unquestionably sound. The plaintiff in error can not engage in one business that is exempt from taxation and thereby render it, or himself, exempt from taxation by adding to his original occupation another which is subject to taxation. "If he would continue to pursue the taxed business let him pay the tax imposed upon all who are engaged therein." If he wishes to do only interstate business this act furnishes no obstacle in the way of taxation. This is equitable and just and offends no

principle of right or justice nor any provision of this State or of the Federal Constitution.

Respectfully submitted,

JNO. C. HART,
Attorney for defendant.

Supreme Court of the United States.

No. 152.—October Term, 1904.

Frank E. Kehrer, Plaintiff in Error, vs. Andrew P. Stewart. } In error to the Supreme Court of the State of Georgia.

[February 27, 1905.]

This was an action by Kehrer against the tax collector of the county of Fulton to recover back a tax of $200 with interest and costs, paid to Stewart under protest, such tax having been assessed against him under the general tax law of the State, of December 21, 1900, which provided that there should be assessed and collected "upon all agents of packing houses doing business in this State, two hundred dollars in each county where said business is carried on." Petitioner charged the law to be a violation of the Fourteenth Amendment.

Defendant demurred to the petition, and this demurrer being overruled, a writ of error was taken from the Supreme Court, which reversed the judgment of the court below in overruling the demurrer. (115 Geo. 184.) Plaintiff thereupon amended his petition, insisting that the tax denied him due process of law as well as the equal protection of the law, impaired the obligation of his contract with the firm, and was also in conflict with the commerce clause of the Constitution of the United States. The defendant demurred to the amended petition. The court sustained the demurrer and the Supreme Court affirmed its action. (117 Geo. 969.)

Mr. Justice Brown delivered the opinion of the Court.

This case arose upon the following state of facts:

Nelson Morris & Co., citizens of Illinois, were engaged, in the city of Chicago, in the business of packing meats for sale and consumption, and also had a place of business in Atlanta, Georgia, where they sold their products at wholesale, having in their employ several clerks and helpers, one of whom was the petitioner, who was employed as chief clerk and manager at a salary of $25 per week. The firm did not have anywhere within the State of Georgia any packing house for slaughtering, dressing, curing, packing or manufacturing the products of any animals for food or commercial use, but took orders, which were transmitted and filled at Chicago, the meats sent to Atlanta and there distributed in pursuance of such orders. Certain meats were also shipped from Chicago to Atlanta without a previous sale or contract to sell. These were stored in the At-

lanta house of the firm in the original packages, and were kept and held for sale, in the ordinary course of trade, as domestic business. They were offered for sale to such customers as might require them, and until sold were stored and preserved and remained the property of the firm.

1. It was admitted by the Supreme Court of Georgia in its opinion, and by both parties hereto, that a tax upon the seller of goods is a tax upon the goods themselves, (*Brown* v. *Maryland*, 12 Wheat. 419; *Welton* v. *Missouri*, 91 U. S. 275;) and that a tax upon goods sold in another State, delivered to a common carrier and consigned to the purchaser in the State of Georgia, was an illegal interference with interstate commerce. (*Caldwell* v. *North Carolina*, 187 U. S. 622; *Norfolk &c. R. R. Co.* v. *Sims*, 191 U. S. 441; *Stone* v. *State*, 117 Geo. 292.) It was therefore held that the tax, so far as applied to meats sold in Chicago and shipped to the petitioner in Georgia for distribution, could not be supported; but that so far as the petitioner was engaged in the business of selling directly to customers in Atlanta, he was engaged in carrying on an independent business as a wholesale dealer, and was liable to the tax.

This decision was correct. In carrying on the domestic business, petitioner was indistinguishable from the ordinary butcher, who slaughters cattle and sells their carcasses, and in principle it made no difference that the cattle were slaughtered in Chicago and their carcasses sent to Atlanta for sale and consumption in the ordinary course of trade. Upon arrival there they became a part of the taxable property of the State. It made no difference whence they came and to whom they were ultimately sold, or whether the domestic and interstate business were carried on in the same or different buildings. In this particular the case is covered by that of *Brown* v. *Houston*, (114 U. S. 622,) wherein it was held that coal mined in Pennsylvania and sent by water to New Orleans, to be sold in open market there on account of the owners in Pennsylvania, became intermingled with the general property of the State, and liable to taxation under its laws, although it might have been after arrival sold from the vessel on which the transportation was made, without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port. The same principle was applied in *Emert* v. *Missouri*, (156 U. S. 96,) in which a license tax upon peddlers of goods, which made no distinction between residents and products of the State and of those of other States, was sustained. To the same effect is *Machine Company* v. *Gage*, (100 U. S. 676.)

The case is readily distinguishable from that of *Crutcher* v. *Kentucky*, (141 U. S. 47,) wherein a State law requiring a license from agencies of foreign express companies was held to be a regulation of interstate commerce, so far as applied to a corporation of another State engaged in interstate business, although as *incidental* thereto it did some local business by

carrying goods from one point to another in the State of Kentucky. The court observed that while the local business was probably quite as much for the accommodation of the people of the State as for the advantage of the company, this did not obviate the objection to the tax; that the regulations as to license and capital stock were imposed as conditions on the companies carrying on the business of interstate commerce, which was manifestly the principal object of its organization. "These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not, they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection."

The same doctrine was applied to telegraph companies in *Leloup* v. *Port of Mobile*, (127 U. S. 640,) wherein a general license tax upon the telegraph company was held to affect its entire business, interstate as well as domestic or internal, and was unconstitutional. This case, however, must be read in connection with the *Postal Telegraph Cable Co.* v. *Charleston*, (153 U. S. 692,) wherein we held that a license tax upon a telegraph company on business done exclusively within the State, and not including any business done to or from points without the State, and not including any business done for the Government of the United States, was an exercise of the police power, and not an interference with interstate commerce. In line with this case is that of *Ratterman* v. *Western Union Tel. Company*, (127 U. S. 411,) in which a percentage tax assessed upon receipts of telegraph companies partly derived from interstate commerce and partly from commerce within the State, and which were capable of separation, but were returned and assessed in gross, and without separation or apportionment, was held invalid in proportion to the extent that such receipts were derived from interstate commerce, but valid as applied to receipts from messages within the State. To the same effect is *Telegraph Company* v. *Alabama*, (132 U. S. 472.)

So, if the stock of a transportation company be taxed by taking as a basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bear to the whole number of miles over which its cars are run throughout the United States, such assessment does not impinge upon the power of Congress. (*Pullman's Car Company* v. *Pennsylvania*, 141 U. S. 18.) The case is still simpler, if the tax be imposed in terms upon the domestic commerce, seeing that the corporation is free to abandon the business taxed if it sees fit. (*Pullman Company* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman Car Company*, 191 U. S. 171.)

The only difficulty in this case arises from the fact that the tax is laid not in terms upon the domestic business, nor upon the gross receipts or profits which might be apportioned between interstate and domestic busi-

ness, but is a gross sum imposed upon the managing agent of packing houses, regardless of the fact that the greater portion of the business may be interstate in its character. This contingency, however, is met by the case of *Osborne* v. *Florida,* (164 U. S. 650,) wherein a license tax imposed upon express companies doing business in Florida had been construed by the Supreme Court of that State as applying solely to business of the company done within the State, and not to its interstate business. Accepting this construction of the State statute as in reality part of the statute itself, we held that it did not in any way violate the Federal Constitution. The statute was sustained, notwithstanding the fact that ninety-five per cent of the business was interstate in its character, and only five per cent consisted of carrying goods and freight between points within the State of Florida. *Crutcher* v. *Kentucky,* (141 U. S. 47,) was distinguished as one which prohibited the agent of a foreign express company from carrying on business at all in that State without first obtaining a license from the State. Said the Court: "It has never been held, however, that when the business of the company, which is wholly within the State, is but (not) a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the State statute."

So, in the case under consideration it was expressly held by the Supreme Court of Georgia that that part of the Nelson Morris & Company's business, which consisted in shipping goods to Atlanta to fill orders previously received, the goods being delivered in accordance with such orders, was interstate commerce, not subject to taxation within the State, and that, so far as applied to that business, the tax was void. Accepting this construction of the Supreme Court, we think the act, so far as applied to domestic business, is valid. The record does not show what proportion of such business is interstate and what proportion is domestic, although it is conceded that most of the business is interstate in its character. If the amount of domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in *Crutcher* v. *Kentucky,* (141 U. S. 47;) but if the agent carried on a definite, though a minor, part of his business in the State by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the other

would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment. The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business.

2. The act in question does not deny to the petitioner the equal protection of the laws, as the tax is imposed alike upon the managing agent both of domestic and of foreign houses. In its first opinion in this case the Supreme Court held that the tax was a vocation or occupation tax, and that it was not designed to apply to every agent or employee of the company, but only to the managing or superintending agent, who is the *alter ego* of the principal by whom he is employed. There is no discrimination in favor of the agents of domestic houses, and, while we may suspect that the act was primarily intended to apply to agents of *ultra* State houses, there is no discrimination upon the face of the act, and none, so far as the record shows, upon its practical administration. As we have frequently held, the State has the right to classify occupations and to impose different taxes upon different occupations. Such has been constantly the practice of Congress under the Internal Revenue laws. (*Cook* v. *Marshall Co.*, 196 U. S. 261, 275.) What the necessity is for such tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the State legislature. So long as there is no discrimination against citizens of other States, the amount and necessity of the tax are not open to criticism here.

3. The argument that the tax impairs the obligation of a contract between the petitioner and Nelson Morris & Company is hardly worthy of serious consideration. The power of taxation overrides any agreement of an employee to serve for a specific sum. His contract remains entirely undisturbed. There was no stipulation for an employment for a definite period; and if there were, it is inconceivable that the State should lose this right of taxation by the fact that the party taxed had entered into an engagement with his employer for a definite period. The tax is an incident to the business, and probably might under the terms of their contract be charged up against the employer as one of the necessary expenses of carrying it on.

The judgment of the Supreme Court of Georgia is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.